(1)

No. 91-6646-CFY
Status: DECIDED

Title: Verl Hadley, Petitioner
v.
United States

Docketed:
December 9, 1991

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Trebon,John

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 9 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 7 1992		Order extending time to file response to petition until February 7, 1992.
6	Feb 3 1992		Brief of respondent United States in opposition filed.
5	Feb 6 1992		DISTRIBUTED. February 21, 1992
8	Feb 24 1992		REDISTRIBUTED. February 28, 1992
10	Mar 2 1992		Petition GRANTED.
			**********
11	Mar 19 1992	G	Motion of petitioner for appointment of counsel filed.
13	Mar 19 1992		Order extending time to file brief of petitioner on the merits until May 4, 1992.
14	Mar 30 1992		Motion for appointment of counsel GRANTED and it is ordered that John Trebon, Esquire, of Flagstaff, Arizona, is appointed to serve as counsel for the petitioner in this case.
15	May 1 1992		Order further extending time to file brief of petitioner on the merits until May 12, 1992.
16	May 5 1992		Joint appendix filed.
17	May 12 1992		Brief of petitioner Verl Hadley filed.
18	Jun 29 1992		Record filed.
		*	Original proceedings U.S. Court of Appeals - Ninth and U. S. District Court - Arizona (2 Boxes) Sealed Documents
20	Jul 8 1992		Order extending time to file brief of respondent on the merits until July 17, 1992.
21	Jul 17 1992		Brief of respondent United States filed.
22	Jul 20 1992		CIRCULATED.
24	Aug 17 1992	X	Reply brief of petitioner filed.
23	Aug 21 1992		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 4, 1992. (3RD CASE)
25	Nov 2 1992		Letter from Counsel for the petitioner received and distributed.
26	Nov 4 1992		ARGUED.
27	Nov 16 1992		Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

1PP

No. 91-6646

12/9/91

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 U.S.C. §3006A(d)(6) and Rule 39 of this Court, Petitioner, Verl Hadley, requests leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the district court and on appeal to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John Trebon
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773

Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PROOF OF SERVICE

STATE OF ARIZONA)
) ss
County of Coconino)

John Trebon, being first duly sworn, deposes and states that he is a member of the Bar of the Supreme Court of the United States; that on December 5, 1991, the petition for writ of certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari, with additional copies of the petition and affidavit of mailing to counsel for respondent and the Solicitor General, Department of Justice:

United States Attorney
230 N. 1st Ave., 4th Flr.
Phoenix, Arizona

Solicitor General
Department of Justice
Washington, D.C. 20530

Dated this 6th day of December, 1991, in Flagstaff, Arizona.

John Trebon, Affiant

SUBSCRIBED & SWORN to before me this 6 day of December, 1991, by John Trebon.

Notary Public

My Commission Expires:

MY COMMISSION EXPIRES JUNE 5, 1992

No. HUSK 8801075

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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U.S. ATTORNEY
PHOENIX

MOTION FOR APPOINTMENT

OF COUNSEL

Verl Hadley was represented by the undersigned counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the Court of Appeals for the Ninth Circuit and by appointed counsel before the district court. Mr. Hadley, by and through counsel, has applied to proceed before this court in forma pauperis. Mr. Hadley, through counsel, also requests that the undersigned counsel be appointed to represent him in all proceedings before this Court and, in addition, requests an order appointing counsel nunc pro tunc for purposes of preparing and submitting the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John Trebon
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773
Attorney for Petitioner

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OFFICE OF THE
SOLICITOR GENERAL

No. 91-1446

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Trebon
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P.O. Box 789
601 N. Humphreys
Flagstaff, Arizona 86002
(602) 779-1713

Counsel for Petitioner

December 6, 1991

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Trebon
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Counsel for Petitioner

December 6, 1991

QUESTIONS PRESENTED

(1) If "intent" is not a genuine or disputed issue in a criminal trial, should the government be allowed to admit overwhelming amounts of uncharged misconduct evidence to a jury under the ruse of proving a technical issue of "intent" required by federal statute?

(2) Should the accused citizen be allowed to stipulate that the requisite "intent" exists in a criminal case in order to remove a technical issue of "intent" as a disputed issue at trial when the accused citizen's sole defense at trial is that he or she did not commit the acts charged in the indictment?

(3) Should the balancing test of Rule 403, Federal Rules of Evidence, require federal courts to consider the accused citizen's stipulation to concede the issue of "intent" as a factor in order to balance the probative value and prejudicial effect of prior misconduct evidence offered by the government?

(4) Should the well-reasoned position of the Second Circuit, allowing a technical issue of "intent" to be removed from criminal cases by the accused citizen as part of a Rules 403 and 404(b) analysis, be approved by this Court over the rigid, vague, and illogical standard seemingly employed by the Ninth Circuit?

LIST OF PARTIES

The caption of the case contains the names of all parties.

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II. The exercise of this Court's power of supervision is appropriate in order to provide authoritative and principled guidelines to the use of prior misconduct evidence under Rules 403 and 404(b) of the Federal Rules of Evidence. The conflict between the circuits should be resolved. The decision of the Court of Appeals for the Ninth Circuit is poorly reasoned and dilutes the accused citizen's right to a fair trial and an objective finding of guilt or innocence. 10

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

The petitioner, Verl Hadley, by and through attorney, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit.

—

INTRODUCTION

One of the most important issues facing our judicial system in criminal cases today relates to the use or misuse of prior misconduct evidence under Rule 404(b) of the Federal Rules of Evidence. The decisions reached in each of the various circuits are inconsistent. In particular, the general standards of admissibility utilized by the Ninth Circuit allow each three-judge panel to affirm or reverse each case by factually distinguishing one case from another. In essence, the standards mean nothing. Criminal defendants are forced to play a game of Russian roulette before the Circuit Courts.

The admissibility of prior bad acts under Rule 404(b) is particularly important in cases where the accused, like Mr. Hadley, faces criminal prosecution for the first time. Although Mr. Hadley had never been convicted of any previous crime, the government was allowed to present layer upon layer of uncharged misconduct evidence and unverified insinuations of behavioral propensities toward minor children on the part of Mr. Hadley. Mr. Hadley was bludgeoned into conviction through the use of prior misconduct evidence, which clearly overshadowed all the other evidence in the case.

The steady barrage of prior misconduct evidence was supposedly admitted for the purpose of establishing the technical issue of "intent" in spite of the fact that "intent" was never a contested issue at trial nor a genuine issue of fact. Although Rule 404

expressly precludes the use of prior misconduct evidence to establish criminal propensity, virtually unlimited prior misconduct evidence was admitted against Mr. Hadley under the ruse of establishing "intent". The government used the prior acts as a basis for arguing criminal propensity during closing argument.

The trial court allowed uncharged acts of sexual misconduct that supposedly occurred seventeen years earlier to be considered by the jury against Mr. Hadley. The Court admitted evidence of dozens of other acts of sexual misconduct even though none of them resulted in conviction. In the end, it was simply impossible for Mr. Hadley to defend against both the counts listed within the indictment, as well as, a flood of uncharged misconduct evidence that overshadowed all other evidence in the case. Since "intent" was not a genuine issue, the prejudicial evidence was unnecessary and harmful.

Mr. Hadley was convicted as a result of a stinging character assassination. The government accused him of socializing with younger males, insisted that he had a reputation for touching male students in class, and insinuated sexual impropriety because he allowed minors to drive his automobile. As all trial lawyers know, the type of character assassination used against Mr. Hadley is extremely effective. Mr. Hadley was convicted not because he was proven guilty of the charges contained within the indictment, but because no jury could let him go after hearing a life-long history

of supposed misdeeds. A compromise verdict resulted. Justice was severely compromised as well.

The Court of Appeals for the Second Circuit has adopted intelligent guidelines for considering the propriety of admitting prior bad acts when "intent" is not a genuine or contested issue at trial. The Ninth Circuit has refused to follow the intelligent guidelines adopted the Second Circuit and other circuits. This Court's supervisory powers should be invoked. This Court has not previously addressed this important issue.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in the case of United States v. Verl Hadley is reported at 918 F.2d 848 (9th Cir. 1990). The decision of the Court of Appeals for the Ninth Circuit affirmed the criminal conviction of Verl Hadley and supported the use of extensive uncharged misconduct evidence. On September 9, 1991, the Court of appeals issued an order denying Mr. Hadley's petition for rehearing and rejected the suggestion for rehearing en banc. The opinion of the Court of Appeals for the Ninth Circuit and the order denying rehearing are included within the Appendix to this petition.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was filed on November 14, 1990. The order denying Mr. Hadley's petition for rehearing and suggestion for rehearing en banc was entered on September 29, 1990. The

jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under Title 28, U.S.C. Sec. 1254(1), and Rule 13.1 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Verl Hadley was a teacher on the Navajo Indian Reservation. He was charged with sexual misconduct involving several students. The indictment against Mr. Hadley followed a series of other cases involving charges of sexual misconduct against teachers on the Navajo Indian Reservation, as well as, a congressional investigation. But, Mr. Hadley was the first Navajo Indian to be charged in the series of cases.

Mr. Hadley was charged with eleven counts of sexual misconduct involving five minor children. A few months before trial, the district court ruled that counts VII through XI of the superseding indictment would be severed -- for purposes of trial -- from counts I through VI. But, the trial Judge subsequently ruled that evidence relating to the first six counts of the superseding indictment would be admissible at the first trial as prior bad acts under Rule 404(b) of the Federal Rules of Evidence. R.T., April 27, 1989, p. 8.

As a result, Mr. Hadley's first and only trial involved five acts of alleged sexual misconduct against three students. Mr. Hadley was convicted of counts VII, VIII, and IX involving Amadee Roy, but was acquitted of counts X and XI involving two other students. Mr. Hadley was sentenced to serve 108 months on Counts

VIII and IX, but was also sentenced to 30 years consecutively on Count VII.

Counts VII and VIII of the superseding indictment charged Mr. Hadley with "aggravated sexual abuse" under Title 18, U.S.C. Sec. 2241(a)(1). In essence, Mr. Hadley was charged with knowingly causing another person to engage in a sexual act by using force against the other person, namely Amadee Roy. Counts IX and XI of the superseding indictment charged Mr. Hadley with "abusive sexual contact" under Title 18 U.S.C. Sec. 2244(a)(3). Both counts essentially charged Mr. Hadley with engaging in "sexual contact" by touching each of the boys. According to federal law, the sexual contact must occur with the intent to arouse or gratify the sexual desire of any person. See Title 18 U.S.C. Sec. 2245(3).

Count X charged Mr. Hadley with child molestation under Arizona law, A.R.S. Section 13-1410, by directly touching the private parts of Jonathan Tsosie. Once again, Arizona law required Mr. Hadley to touch Jonathan Tsosie because of an unnatural sexual interest in children.

Mr. Hadley's defense at trial was simply that he did not commit any of the acts alleged against him. Mr. Hadley argued that the acts did not take place. During trial, Mr. Hadley expressly agreed to stipulate that each of the acts, if they occurred, took place for the purpose of sexual gratification or an unnatural sexual interest in children. In other words, the issue of "intent" was not a contested issue at trial. The only genuine issue was

whether or not Mr. Hadley actually touched or molested the children named within the indictment.

The government turned down Mr. Hadley's offer to stipulate that the prerequisite "intent" or motive existed for each count and the trial court insisted that the government could prove "intent" in any manner it deemed appropriate. Therefore, under the ruse of proving "intent", the government was unrestrained in its ability to introduce prior misconduct evidence on the technical issue of "intent" even though it was not a material or disputed issue at trial, including the following:

1. Judge Carroll ruled that all of the alleged acts of sexual misconduct between Mr. Hadley and a former student, Cory Kay, contained within counts I through VI of the superseding indictment were admissible at the first trial. Each of the first six counts of the superseding indictment involving Cory Kay alleged involuntary sodomy on the part of Mr. Hadley. But, Cory Kay was not only allowed to testify about the acts focused upon within each of the first six counts, he was also allowed to testify about numerous, unspecified prior bad acts. Cory Kay testified that he engaged in anal intercourse with Mr. Hadley on more than 10 occasions. R.T., Vol. 5, p. 897.

2. The government was allowed to introduce testimony about prior sexual misconduct dating back seventeen years. The trial court justified the admission of prior bad act evidence dating back seventeen years because "the methods of proof that are available to

the government" in cases from Indian Reservations, where people are "unsophisticated", require a more liberal rule regarding uncharged misconduct evidence. R.T., Vol. 9, pp. 1644-45.

Kyle Hartman was allowed to testify that he engaged in a series of sexual relations with Mr. Hadley from 1972 to 1976 when he was a student in Kayenta, Arizona. At that time, Mr. Hadley was employed as a teacher's aid. R.T., Vol. 9, pp. 1663-73. Mr. Hartman, age 27, was allowed to testify about numerous, specific acts of sodomy that supposedly occurred with Verl Hadley when he was in grade school. Mr. Hartman also testified that he sodomized Mr. Hadley as well. R.T., Vol. 9, p. 1670.

Judge Carroll reasoned that the prior bad acts relating to sodomy would be helpful to the jury in determining Mr. Hadley's motive in merely touching other boys. In other words, according to Judge Carroll, prior bad act testimony would be admissible to show the jury that Mr. Hadley's true motive in touching children was eventually to lead up to sodomy. R.T., Vol. 4/27/89, p. 8. Yet, somehow, Judge Carroll concluded that he was not admitting the prior bad acts for the purpose of showing propensity.

Judge Carroll summarized his position by stating that, "The jury ought to know what kind of person Mr. Hadley is, because it relates to his motive for doing things, or his intention for doing things with these children. ... Common sense tells me that the jury ought to know something about Mr. Hadley. ... because it does deal with his motives, his intention or whether or not he is a good

guy ...". R.T., Vol. 3, pp. 670-672. The obvious use of the prior misconduct evidence was to establish propensity, which is normatively precluded by Rule 404(b), Federal Rules of Evidence.

3. On cross-examination of Mr. Hadley, the government, over strenuous objections by the defense, continuously asked Mr. Hadley whether he gave automobile rides to minor students; whether he ever had any male students as guests at his residence; whether he ever provided any alcohol to any male students; whether or not he had a reputation for touching students in his classes; and whether he had a reputation for tickling students on their thighs or their backs.

4. The government was allowed to question Mr. Hadley about a traffic citation that he received during 1976 for supposedly allowing an unauthorized minor to drive his automobile. Judge Carroll ruled that a criminal defendant may be cross-examined on extrinsic matters or prior bad acts more broadly then any other witness. R.T., Vol. 8, pp. 1426, 1435 and Vol. 9, pp. 1632-33. Therefore, Mr. Hadley could be cross-examined about a traffic citation that he received from a police officer in 1976, even though no conviction resulted. Although the government presented no evidence of sexual misconduct, counsel for the government insinuated that misconduct occurred. Since counts VII and VIII involving Amadee Roy involved alleged misconduct in an automobile, the government used the 1976 incident as another prior bad act to establish propensity. According to Judge Carroll, Mr. Hadley "puts

his character in issue when he takes the stand." R.T., Vol. 7, p. 1343.

During closing argument, the government specifically used the testimony of Kyle Hartman to show Mr. Hadley's propensity to engage in sexual conduct with minor children. The government used the testimony of Kyle Hartman to show that Mr. Hadley lied when he said that he did not have sexual intercourse with other, specified minor children. R.T., Vol. 9, p. 1729. In the same vein, counsel for the government also used the 1976 traffic ticket to argue propensity against Mr. Hadley. R.T., Vol. 9, p. 1796. The government hinted that both the testimony of Cory Kay and Kyle Hartman could be used to show Mr. Hadley's sexual propensities. R.T., Vol. 9, p. 1798.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Ninth Circuit in the Hadley case conflicts with a series of well-reasoned opinions from the Court of Appeals for the Second Circuit. One of the most important issues facing our judicial system in criminal cases today relates to the use or misuse of prior misconduct evidence under Rule 404(b) of the Federal Rules of Evidence. The decisions reached between the various circuit courts are not only inconsistent, but treat one of the most fundamental rules of evidence in a dramatically different manner.

The exercise of this Court's power of supervision is appropriate in order to provide authoritative and principled guidelines to the use of prior misconduct evidence under Rules 403 and 404(b) of the Federal Rules of Evidence. The conflict between the circuits should be resolved. The decision of the Court of Appeals for the Ninth Circuit is poorly reasoned and dilutes the accused citizen's right to a fair trial and an objective finding of guilt or innocence.

The only relevant question at trial was whether or not Mr. Hadley actually committed sexual misconduct with the minor children. Mr. Hadley never contended that he innocently or accidently or mistakenly sodomized or touched the private parts of the minor children. Instead, Mr. Hadley simply denied that he participated in any of the charged offenses. The government was able to use the issue of "intent" as a ruse to admit a steady stream of prior misconduct evidence in order to prejudice the jury against Mr. Hadley.

We not only submit that Mr. Hadley failed to receive a fair trial, but also that some principled logic must apply to Rule 404(b) in cases where "intent" is nothing more then a facade, rather then a genuine issue. The decision of the Court of Appeals for the Ninth Circuit applies no principled limits to the introduction of Rule 404(b) evidence. Clearly, some limits should apply. If any rational limit applies, then the facts of this case show that any rational limit was exceeded. Fortunately, other

circuits have applied rational limitations upon the use of Rule 404(b) evidence. Since a clear split in the circuits exists, this Court should review Mr. Hadley's case in order to resolve the differences between the circuits and to apply fundamental rules of justice in one of the most important and troubling areas of evidence encountered by our criminal justice system.

The Second Circuit, for instance, has now held that evidence of prior bad acts is not admissible under Rule 404(b) if the defendant affirmatively acts to remove the issue of intent from the case. United States v. Colon, 880 F.2d 650 (2nd Cir. 1989); United States v. Figueroa, 618 F.2d 934, 941-42 (2nd 1980); United States v. Manafzadeh, 592 F.2d 81, 87 (2nd Cir. 1979); United States v. O'Connor, 580 F.2d 38, 41 (2nd Cir. 1978); United States v. Williams, 577 F.2d 188 (2nd Cir. 1978), cert. denied, 439 U.S. 868 (1978). Other courts have held that evidence of prior misconduct under Rule 404(b) cannot be admitted unless specific intent is actually a disputed issue in the case. See, e.g., United States v. Gruttodauro, 818 F.2d 1323, 1327-28 (7th Cir. 1987)(Mental state inferred from surrounding circumstances).

Other circuits tend to follow the position and logic of the Second Circuit. If "intent" or knowledge is not a genuine issue at trial, then the incremental value of the uncharged misconduct evidence is not only substantially reduced, but the danger of unfair prejudice is needlessly increased. The Ninth Circuit, as represented in the Hadley decision, is especially rigid in allowing

evidence of prior bad acts without focusing upon the genuine need for the evidence and less prejudicial alternatives. See, e.g., United States v. Ferrer-Cruz, 899 F.2d 135, 138 (1st Cir. 1990)("We agree with Ferrer that, were knowledge and intent not issues in the case, the prejudicial effect of the past conviction would inevitably overcome the need for the evidence."); Carter v. District of Columbia, 795 F.2d 116 (D.C. Cir. 1986)(error to admit evidence in light of much less prejudicial alternative); United States v. Dilliole, 597 F.2d 102, 106 (7th Cir. 1979), cert. denied, 422 U.S. 946 (1979)(trial court must assess the usefulness of the government's need for the evidence); United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979)("If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded."). Also see Advisory Committee' Note to Rule 403 and 404(b)("The determiniation must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."); Vol. 2, Louisell & Mueller, Federal Evidence, Sec. 140, at pp. 116-17 (1978)("If, on the contrary, the point is conceded, or strongly supported by other proof, then the need factor points toward exclusion, and should weigh heavily, perhaps decisively, on the scales.").

Mr. Hadley's sole defense at trial was that he did not commit the acts alleged within the indictment. Mr. Hadley, through counsel, unequivocally agreed to stipulate that the "intent" required by the federal statutes existed.

> Finally, as previously stated, Mr. Hadley does not contest the issue of "intent" or "motive" in this case. Indeed, Mr. Hadley's attorney has previously stated that he will stipulate that the requisite intent exists in this case. In other words, Mr. Hadley is willing to affirmatively act to remove the issue of intent from this case.

Supplemental Memorandum submitted by Mr. Hadley during trial, at p.3 (CR 117). Both the district court and the Court of Appeals for the Ninth Circuit rejected Mr. Hadley's proffered stipulation and the reasoning of a series of persuasive cases from the Second Circuit.

Moreover, proof of the acts charged against Mr. Hadley tended to infer the existence of intent, thereby removing the need for prior misconduct evidence. See, United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984). One simply does not engage in sexual acts without the intent to "gratify the sexual desires of any person". See Title 18, U.S.C. Section 2245(3). "The ideal case for exclusion [of prior bad acts] is one in which ... the nature of the crime is such that accident would not be a plausible defense." Edward J. Imwinkelried, Uncharged Misconduct Evidence, Sec. 5:10, at p. 5-21 (Callaghan & Co. 1984).

The use of prior bad acts in cases charging misconduct against children is particularly troubling and prejudicial. Substantial prejudice is guaranteed.

> [T]o bombard the [factfinder] with evidence that appellant is a child abuser in general . . . presents a classic example of the kind of evidence which hopelessly distracts the [factfinder] from the issues [it is] called upon to resolve and adulterates the deliberative process.

Clark v. State, 693 S.W.2d 35, 38 (Tex. App. 1985). Objective data indicates beyond question that evidence of prior bad acts is usually fatal to a defendant's case. A fair trial may be rendered futile in the face of evidence of other misconduct by the accused. Limiting instructions are simply not effective. See, e.g., Greene and Loftus, When Crimes Are Joined at Trial, Vol. 9, Law and Human Behavior, p. 193 (1985); Tanford, Penrod, and Collins, Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions, Vol. 9 Law and Human Behavior, p. 319 (1985); Wissler and Saks, On the Inefficacy of Limiting Instructions, Vol. 9 Law and Human Behavior, P. 37 (1985); Kalven and Zeisel, The American Jury, pp. 160-61, 178-79 (1966); Borchard, Convicting the Innocent (1932).

Moreover, counsel for Mr. Hadley expressly requested that the trial court wait until the close of Mr. Hadley's case to determine whether "intent" or "motive" were contested issues in the case. Then, a more informed decision could be made about the probative value of the proffered evidence. Judge Carroll, however, refused

to stay his hand. R.T., Vol. 3, p. 674. Other circuits have found that the decision to allow prior misconduct evidence on the issue of "intent" should wait until the defendant has put his case before the jury in order to determine whether or not "intent" is actually a contested issue in the case. See, United States v. Figueroa, 618 F.2d 934, 939 (2nd 1980); United States v. Robinson, 560 F.2d 507, 515 (2nd Cir. 1977), cert. denied, 435 U.S. 905 (1978). But, once again, the Ninth Circuit has refused to adopt rules that carefully regulate the use of prior misconduct evidence.

> We are particularly reluctant when the evidence is of such a highly prejudicial nature that some jurists and commentators regard it as nearly dispositive, making the guilty verdict almost a formality. [cites omitted].

State v. Treadaway, 586 P.2d 1061, 1065 (Ariz. 1977). Indeed, the certainty of prejudice in allowing evidence of prior bad acts in cases of sexual misconduct "is at its highest." State v. Smith, 725 P.2d 951, 952, (Wash. 1986).

> Roach's defense is that he did not commit the act. He does not, as well he could not, contend that he committed the act with innocent intent. [cite omitted] ... we do not believe that intent was sufficiently at issue to allow the questioned evidence as probative of intent.

State v. Roach, 712 P.2d 674, 676 (Idaho 1985)(Lewd and Lascivious conduct with a minor child).

The apparent desire of the Ninth Circuit and other circuits to allow extensive use of prior misconduct evidence in cases involving

allegations of sexual misconduct against children not only creates a split in the circuits, but allows an unprecedented and unjustified diversion from the Federal Rules of Evidence.

> It became clear that many courts were not applying the normal requirements in sex offense prosecutions; there was a discernible distinction between the standards for admitting uncharged misconduct in sex and nonsex offense cases. The courts were routinely straining and distorting the plain doctrine to rationalize the admission of evidence of the defendant's uncharged sexual misconduct. In some jurisdictions, intellectual honesty triumphed, and the courts eventually acknowledged that they were recognizing a special exception to the norm prohibiting the use of the defendant's disposition as circumstantial proof of conduct.

Edward J. Imwinkelried, Uncharged Misconduct Evidence, Sec. 4:14 at p. 4-31 (1984)(Callaghan & Co. 1984).

The decision in United States v. Verl Hadley, 918 F.2d 848, 852 (9th Cir. 1990), applies a superficial and unyielding view of Rules 404(b) and 403 of the Federal Rules of Evidence.

> The government must prove every element of a crime beyond a reasonable doubt [cite omitted]. This burden is not relieved by a defendant's promise to forgo argument on an issue [cite omitted]. Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime.

But, Mr. Hadley did not focus his defense on any "element" of the crime; his defense was simply and completely that he did not commit the acts charged.

The reasoned position of the Second Circuit is clearly superior to the concrete inflexibility offered by the Hadley decision. The position held by the Second Circuit gives true meaning to Rule 403 (balance probative value and prejudicial effect of prior misconduct evidence) and protects the right of the accused citizen to a fair trial. The position taken by the Ninth Circuit dilutes the accused citizen's right to a fair trial and leaves the balancing test of Rule 403 as a sterile concept without viable guidelines or vitality.

> Strictly speaking, Colon's plea of not guilty to the charge that he aided and abetted Alvarado's sale of heroin put his state of mind in dispute, as the government bore the burden of proving that Colon had the specific intent that his actions bring about the sale. See United States v. Aiello, 864 F.2d 257, 262-63 (2d Cir.1988) (quoting United States v. Wiley, 846 F. 2d 150, 154 (2d Cir.1088) (in turn quoting United States v. Zambrano, 776 F.2d 1091, 1097 (2d Cir.1988). Nevertheless, in some circumstances, the nature of a defense put forth by the defendant may reveal that "[k]nowledge and intent, while technically at issue, [are] not really in dispute." United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir.1978). In some cases, the defendant may specifically offer to stipulate to an issue and thereby remove it from the case. See Mohel, 604 F.2d at 752-54; Manafzahed, 592 F.2d at 87.
>
> * * *
>
> In Manafzadeh, 592 F.2d 81, upon which Colon primarily relies, we reversed convictions on two counts of unlawfully transporting or causing to be transported falsely made checks. We held that evidence of subsequent crimes was erroneously admitted to prove intent because intent had not truly been

> in dispute. As we noted, "Manafzadeh's defense was not that he had innocently or mistakenly participated in the preparation or deposit of the ... checks .... His defense was that he had never been involved in the creation or negotiation of these fraudulent checks at all." Id. at 85. Moreover, the defendant repeatedly offered to stipulate to intent if the jury found that he had participated in the creation or deposit of the checks. Id. Thus, we concluded, "intent was not dispute and any doubt about its nonexistence as an issue was dispelled by the offer of the defendant to stipulate to the existence of the requisite intent if the other elements of the offense should be found." Id. at 87.
>
> In Ortiz, a defendant was charged with possession of heroin with intent to distribute. We found that a "mistaken identity" defense by Ortiz claiming that she had never possessed any heroin, had it been adhered to, would have been sufficient to remove the issue of intent from the case. We stated, "intent is not placed in issue by a defense that the defendant did not do the charged act at all." Ortiz, 857 F.2d at 904; see also Figueroa, 618 F.2d at 939-42 (defendant Acosta did not challenge proof that bag contained heroin, but instead denied the episode had occurred at all); Mohel, 604 F.2d at 752 (defendant did not claim that he had thought he was selling legal substance, but that he had not participated in any transaction); Benedetto, 571 F.2d at 1249 (defendant did not claim that he had taken money innocently or mistakenly, but that he had not taken it at all).
>
> Our cases have thus recognized a distinction between defense theories that claim that the defendant did not do the charged act at all, and those that claim that the defendant did the act innocently or mistakenly, with only the latter truly raising a disputed issue of intent. See 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶404[09], at 494-64-404-66 (1988).

United States v. Colon, 880 F.2d 650 (2nd Cir. 1989).

The position taken by the Second Circuit has been followed by enlightened state courts as well. Coler v. State, 418 So.2d 239, 239 (Fla. 1982); State v. Roach, 712 P.2d 674, 676 (Idaho 1985).

Mr. Hadley was bludgeoned into conviction with the use of prior misconduct evidence. The trial court allowed layer upon layer of uncharged misconduct evidence for the supposed purpose of establishing "intent" even though "intent" was not a genuine issue at trial. Indeed, it would have been impossible for Mr. Hadley to argue that he touched the private parts of minor students or tried to put his penis in their anus for some purpose other than sexual gratification.

The perfunctory affirmance by the Ninth Circuit shows the great need for further analysis of Rules 403 and 404(b). Some of the federal circuits now employ intellectual honesty by ruling that prior sexual misconduct evidence is inappropriate unless "intent" is a genuine and disputed issue at trial. In light of Mr. Hadley's position at trial and his express willingness to stipulate that the requisite "intent" existed, then it is beyond doubt that "intent" was not a disputed issue in this case. This Court should apply principled logic to the use of prior misconduct evidence and approve the position of the Ninth Circuit.

Therefore, we request that this court accept Mr. Hadley's Petition for Certiorari to the Court of Appeals for the Ninth Circuit. We request that this Court return some semblance of logic to the use of prior misconduct evidence and return fundamental fairness to serious criminal trials.

CONCLUSION

For all of the foregoing reasons, Verl Hadley requests that the Supreme Court issue a Writ for Certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

Dated: December 6, 1991

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APPENDIX

[8, 9] The test for validity of probation conditions, even where preferred rights are affected, is "whether the limitations are primarily designed to affect the rehabilitation of the probationer or insure the protection of the public." *Id.* at 265, n. 14. To apply this test, our court "must determine whether the sentencing judge imposed the conditions for permissible purposes, and then it must determine whether the conditions are reasonably related to the purposes." *United States v. Terrigno*, 838 F.2d 371, 374 (9th Cir.1988). "[T]he standard for determining the reasonable relationship between probation conditions and the purposes of probation is necessarily very flexible precisely because 'of our uncertainty about how rehabilitation is accomplished.'" *Id., quoting Consuelo-Gonzalez*, 521 F.2d at 264.

[10] The condition of probation imposed here meets this test. The record supports the conclusion that the judge imposed the requirement of a public apology for rehabilitation. Neither Clark nor Jeffery have admitted guilt or taken responsibility for their actions. Therefore, a public apology may serve a rehabilitative purpose. *See Gollaher v. United States*, 419 F.2d 520, 530 (9th Cir.) ("It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault."), *cert. denied*, 396 U.S. 960, 90 S.Ct. 434, 24 L.Ed.2d 424 (1969). Because the probation condition was reasonably related to the permissible end of rehabilitation, requiring it was not an abuse of discretion.

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Verl HADLEY, Defendant-Appellant.

No. 89-10428.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 16, 1990.

Decided Nov. 14, 1990.

Defendant was convicted in the United States District Court, District of Arizona, Earl H. Carroll, J., of aggravated sexual abuse and abusive sexual contact. Defendant appealed. The Court of Appeals, Wallace, Circuit Judge, held that: (1) district court did not abuse its discretion in admitting evidence of defendant's prior acts of sexual abuse; (2) district court did not abuse its discretion in admitting explanatory expert witness testimony; (3) there was sufficient evidence of defendant's intent to engage in sexual act with minor to support his conviction for attempted aggravated sexual abuse; and (4) Sentencing Guidelines were not applicable to defendant's aggravated sexual abuse of minor which occurred prior to Guidelines' effective date.

Affirmed.

1. Criminal Law ⇐371(1)

If used to prove intent, evidence of prior bad act must be similar to offense charged. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

2. Criminal Law ⇐374

Jury reasonably could have concluded that aggravated sexual abuse defendant had previously sodomized and abused witnesses, as required for witnesses' testimony to be admissible as evidence of prior bad acts; witnesses testified in detail about sexual abuse inflicted upon them. Fed. Rules Evid.Rule 404(b), 28 U.S.C.A.

3. Criminal Law ⇐369.2(5)

Claimed pattern of sodomy and sexual molestation of witness by defendant, which ceased ten years prior to acts for which defendant was charged with aggravated sexual abuse and abusive sexual contact, was not too remote to be admissible as prior bad act evidence. Fed.Rules Evid. Rule 404(b), 28 U.S.C.A.

4. Criminal Law ⇐371(9)

Witnesses' prior bad act testimony that aggravated sexual abuse defendant had sodomized and sexually abused them when they were children was sufficiently similar to offense charged to allow admission of testimony as evidence of intent; in all cases, defendant isolated his student victims and performed acts of sexual gratification upon them, often including anal intercourse. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

5. Criminal Law ⇐328

Government's burden to prove every element of crime beyond reasonable doubt is not relieved by defendant's promise to forego argument on issue.

6. Criminal Law ⇐371(9)

Possibility of unfair prejudice from witnesses' prior bad act testimony, that aggravated sexual abuse defendant had sodomized and sexually abused them when they were children, did not substantially outweigh probative value of evidence to establish intent. Fed.Rules Evid.Rules 403, 404(b), 28 U.S.C.A.

7. Witnesses ⇐318

Expert psychiatric testimony as to general behavior characteristics that may be exhibited in sexually abused children did not improperly bolster children's testimony in prosecution of defendant for aggravated sexual abuse and abusive sexual contact; testimony was limited to discussion of class of victims generally and merely assisted trier of fact in understanding evidence.

8. Criminal Law ⇐486(4)

Test allowing admission of evidence based on novel scientific technique only if technique is generally accepted as reliable in relevant scientific community was not applicable to expert's psychiatric testimony as to general behavior characteristics of sexually abused children, which was based upon expert's professional experience and did not employ any special techniques or models.

9. Criminal Law ⇐474.4(4)

Defendant convicted of aggravated sexual abuse and abusive sexual contact pointed to no specific prejudicial effect substantially outweighing probative value of expert psychiatric testimony as to general behavior characteristics of sexually abused children and, thus, there was no abuse of discretion in admission of testimony; testimony helped to explain testimony of abused children and, thus, rendered appreciable help to jury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

10. Criminal Law ⇐44

To constitute "attempt," there must be more than mere preparation to commit crime; there must be some appreciable fragment of crime in progress.

See publication Words and Phrases for other judicial constructions and definitions.

11. Sodomy ⇐6

There was sufficient evidence of defendant's intent to engage in sexual act with minor to support his conviction for attempted aggravated sexual abuse; defendant asked minor to sit on his lap while defendant was driving and tried to get minor to remove his pants, minor felt defendant getting erection while minor was sitting on defendant's lap, and similar sexual abuse had occurred a month before. 18 U.S.C.A. § 2241(a)(1).

12. Criminal Law ⇐1236

Sentencing Guidelines were not applicable to defendant's aggravated sexual abuse of minor, which occurred prior to Guidelines' effective date. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

John Trebon, Flagstaff, Ariz., for defendant-appellant.

Gary A. Husk, Asst. U.S. Atty., Phoenix, Ariz., for plaintiff-appellee.

Appeal from the United States District Court for the District of Arizona.

Before WALLACE, ALARCON and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Hadley appeals his convictions for aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(1) and abusive sexual contact in violation of 18 U.S.C. § 2244(a)(2). He argues that the district court abused its discretion by improperly admitting evidence of prior acts of sexual abuse and explanatory expert witness testimony. He contends that insufficient evidence exists to convict him on one of the three counts on which he was found guilty. Finally, Hadley challenges his sentence, on the ground that it was not imposed in accordance with the Sentencing Guidelines. The district court exercised jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

Hadley is a former elementary school teacher who taught for eleven years at the Bureau of Indian Affairs School (BIA school) on the Navajo Indian Reservation at Chilchinbeto, Arizona. Complaints of sexual molestation led to an investigation of Hadley, which resulted in an indictment charging him with eleven counts of sexual abuse involving five minor victims. The district court granted Hadley's motion to sever, and the subsequent trial dealt only with counts seven through eleven of the superseding indictment. Counts seven through nine charged Hadley with aggravated sexual abuse, attempted aggravated sexual abuse, and abusive sexual contact. These charges arose from allegations that Hadley had committed forcible anal intercourse and other acts of sexual abuse against Roy, a student at the BIA school.

Roy testified at trial to three separate incidents of sexual molestation by Hadley in late 1987 and early 1988. In addition, over Hadley's objection, the district court allowed other government witnesses to testify that Hadley had forcibly sodomized them when they were minors. The government also presented the expert testimony of Dr. Rosenzweig, a child psychiatrist, who testified on the issue of general behavior characteristics exhibited by victims of child sexual abuse.

The jury found Hadley guilty of the three crimes perpetrated against Roy. Hadley was acquitted on the remaining two counts, which involved less serious allegations by two other students. The district judge sentenced Hadley to 30 years' imprisonment for his conviction of aggravated sexual abuse as charged in count seven, and to 108 months for the convictions on counts eight and nine. The judge ordered that the sentences for counts eight and nine be served consecutively to the sentence for count seven, and imposed fines totaling $20,000.

II

Hadley first argues that the district court should not have admitted the prior bad act testimony of witnesses who testified that Hadley had sodomized and sexually abused them when they were children. We review a district court's decision to admit evidence of prior bad acts under Fed. R.Evid. 404(b) only for an abuse of discretion. *United States v. Brown*, 873 F.2d 1265, 1267 (9th Cir.1989). Indeed, we have held that Rule 404(b) is an "inclusionary rule," under which evidence is inadmissible "only when it proves nothing but the defendant's criminal propensities." *United States v. Diggs*, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed.2d 387 (1981). Therefore, the district judge is "accorded wide discretion in deciding whether to admit such evidence." *Id.*

[1] Rule 404(b) allows the introduction of prior bad acts "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). We have held that evidence is admissible under Rule 404(b) if: (1) sufficient proof exists for the jury to find that the defendant committed the prior act; (2) the prior act was not too

remote in time; and (3) the prior act is introduced to prove a material issue in the case. *United States v. Ross*, 886 F.2d 264, 267 (9th Cir.1989) (*Ross*), *cert. denied*, — U.S. —, 110 S.Ct. 1818, 108 L.Ed.2d 947 (1990); *United States v. Spillone*, 879 F.2d 514, 518–20 (9th Cir.1989) (*Spillone*), *cert. denied*, — U.S. —, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990). In addition, if used to prove intent, the prior act must be similar to the offense charged. *Id.* at 519.

[2] First, we hold that sufficient evidence of the prior bad acts existed for a jury to "reasonably conclude that the act[s] occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988). The witnesses testified in detail about the sexual abuse inflicted upon them by Hadley. This testimony clearly amounted to more than the "unsubstantiated innuendo" that the Supreme Court warned against in *Huddleston*. *Id.* Thus, the jury reasonably could have concluded that Hadley previously sodomized and abused these witnesses.

[3] Second, one witness testified to a regular pattern of sodomy and sexual molestation that began when the boy was ten years old, and lasted until 1977 when he was fifteen. Hadley argues that this act is too remote in time to justify admissibility. We have previously declined to adopt an inflexible rule regarding remoteness in the context of Rule 404(b). *See Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 514. Hadley stopped sexually abusing this witness ten years prior to the abuse for which he was convicted. The district judge found that "there certainly is a similarity in space and practice" between the prior act and the offense charged. The similarity of the prior act to the offense charged outweighs concerns regarding its remoteness. Thus, we hold that the district judge did not abuse his discretion in admitting this testimony. *Cf. Ross*, 886 F.2d at 267 (admitting evidence of a prior act that occurred 13 years beforehand based on the similarity of the offenses); *Spillone*, 879 F.2d at 519 (admitting evidence of a conviction more than ten years old).

[4] Third, Hadley contends that the prior bad act evidence was not introduced to prove a material element in the case. Hadley was charged in count nine with abusive sexual contact. To demonstrate sexual contact, the government had to prove that Hadley acted "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2245(3). The district judge found that the prior acts "have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature." In addition, the evidence helped to demonstrate specific intent, the proof of which was required in all three counts. On this basis, it was properly admitted. Of course, as pointed out above, if the prior acts are used to prove intent, those acts must be similar to the offense charged. The district judge found that they were, and we do not disagree. In all cases, Hadley isolated his student victims and performed acts of sexual gratification upon them, often including anal intercourse. We conclude that this similarity was sufficient to allow the admission of the prior acts as evidence of intent.

Hadley argues that *United States v. Powell*, 587 F.2d 443 (9th Cir.1978), requires a different result. Powell was convicted of conspiracy to possess marijuana with intent to distribute. *Id.* at 445. At trial the government offered proof of two prior convictions on three theories of relevance: intent, plan, and motive. *Id.* at 447. The district court refused to admit either of the prior convictions on the theories of intent or plan, but admitted one of the prior convictions as relevant to motive. *Id.* at 447–48. We reversed and remanded for a new trial. *Id.* at 449.

Hadley urges reliance on a single sentence in *Powell*: "When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b)." *Id.* at 448. At trial, Hadley's defense was a denial of participation in the acts of which he was convicted; he offered not to argue the issue of intent. Thus, he contends, *Powell* precludes the government from proving intent with evidence of prior bad acts.

This is not the holding of *Powell*. Indeed, nothing in *Powell* on the issue of intent could have been its holding, because the district court's ruling on the issue was not challenged on appeal. Powell appealed the district court's decision to admit the prior conviction as relevant to motive. The district court's ruling on intent was uncontested on appeal. Powell did not challenge the district court's refusal to admit the evidence on the theory of intent, as this ruling was favorable to him. Significantly, the government did not cross-appeal. Thus, the statement relied on by Hadley was nonbinding dicta which cannot control the outcome in a subsequent case.

[5] Hadley's argument can be read to suggest we adopt the *Powell* dicta as persuasive authority. The statement, as interpreted by Hadley, goes too far. The government must prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970). This burden is not relieved by a defendant's promise to forgo argument on an issue. *See Spillone*, 879 F.2d at 518 (evidence of prior conviction properly admitted on issue of intent despite defendant's promise not to argue it). Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime. Hadley's choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means. Rule 404(b) permits the government to prove intent by evidence of prior bad acts, and we have already held that admission of such a proof in this case was not an abuse of discretion under the rule.

[6] We must also investigate, however, whether the prior bad acts should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice. Fed.R.Evid. 403; *Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 520. The evidence was highly probative on the question of intent, especially in light of the similarity found between the prior acts and the offense charged. The evidence was obviously prejudicial, but its prejudicial effect was limited by the instruction given by the district court. *United States v. Boise*, 916 F.2d 497, 502 n. 13 (9th Cir.1990) (as amended); *Spillone*, 879 F.2d at 520. The court properly instructed the jurors that they could use the prior bad acts evidence to establish intent and motive only if they first found that the other evidence established beyond a reasonable doubt that Hadley committed the acts charged. The possibility of unfair prejudice did not substantially outweigh the probative value of the evidence.

Thus, we conclude that the district court did not abuse its discretion in admitting the evidence of Hadley's prior acts of sexual abuse.

III

Hadley next contends that the district court improperly admitted the expert testimony of Dr. Rosenzweig, a child psychiatrist who testified for the government. We review the district court's decision to admit expert psychiatric testimony for abuse of discretion. *United States v. Binder*, 769 F.2d 595, 601 (9th Cir.1985).

[7] Hadley first argues that the expert testimony should have been excluded because it improperly bolstered the testimony of the minor victims. In support of this argument, he cites our decision in *Binder*, where we held that the district court erroneously admitted expert testimony that addressed the credibility of the abused children. In that case, however, "the experts testified that [those] particular children in [that] particular case *could be believed*." *Id.* at 602 (emphasis added). Dr. Rosenzweig, on the other hand, testified about general behavior characteristics that may be exhibited in children who have been sexually abused, and the testimony was therefore limited "to a discussion of a class of victims generally." *Id.* Because this general testimony merely "assist[ed] the trier of fact in understanding the evi-

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dence," *id.*, Dr. Rosenzweig did not improperly bolster the children's testimony.

[8] Hadley next contends that Dr. Rosenzweig's testimony failed to qualify under the test adopted in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), and thus should not have been admitted. The *Frye* test allows admission of "[e]vidence based on a novel scientific technique" only if the technique is generally accepted as reliable in the relevant scientific community. *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir.1985) (*Solomon*). We have held, for example, that an expert's conclusions on sexual abuse based on a child's behavior with anatomically correct dolls must pass the *Frye* test. *See United States v. Gillespie*, 852 F.2d 475, 480–81 (9th Cir.1988). The district court found that Dr. Rosenzweig's testimony was not based on any "novel scientific technique," *Solomon*, 753 F.2d at 1526, and thus need not qualify under *Frye*. Because Dr. Rosenzweig merely testified to general behavioral characteristics based upon his professional experience, and did not employ any special techniques or models, the district court correctly concluded that the *Frye* test was not applicable.

[9] Finally, Hadley argues that Dr. Rosenzweig's testimony was more prejudicial than probative, and therefore violated Fed. R.Evid. 403. The testimony helped to explain the testimony of the abused children, and therefore rendered "'appreciable help'" to the jury. *Solomon*, 753 F.2d at 1525, *quoting United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885, 969, 100 S.Ct. 179, 460, 62 L.Ed.2d 116, 383 (1979). Hadley points to no specific prejudicial effect that substantially outweighs this probative value, and therefore, discretion was not abused in the admission of the expert testimony.

IV

We next review Hadley's contention that there was insufficient evidence to convict him of count eight, attempted aggravated sexual abuse of Roy. In reviewing a claim of insufficient evidence, we must determine whether, viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the defendant[ ] guilty beyond a reasonable doubt." *United States v. Murray*, 751 F.2d 1528, 1534 (9th Cir.), *cert. denied*, 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 335 (1985).

The facts relating to count eight indicate that in November 1987, Hadley gave Roy a ride home from a swimming pool and persuaded Roy to sit on his lap and drive the vehicle. Upon feeling Hadley's penis grow erect beneath him, Roy got off his lap and returned to the passenger seat. Only one month earlier, Hadley had used the same modus operandi to penetrate Roy's anal cavity, which led to his conviction on count seven for aggravated sexual abuse.

[10] We have held that "attempt includes an element of specific intent even if the crime attempted does not." *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir.1990). Thus, to justify a conviction on count eight, the government must have proven beyond a reasonable doubt that Hadley intended to engage in a prohibited sexual act with Roy in November 1987. *See* 18 U.S.C. § 2245(2)–(3) (defining "sexual act" and "sexual contact"). In addition, to constitute an attempt, there must be more than mere preparation to commit a crime. "There must be 'some appreciable fragment of the crime' in progress." *United States v. Runco*, 873 F.2d 1230, 1232 (9th Cir.1989) (*Runco*), *quoting United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir.1987).

[11] The government introduced evidence that: (1) Hadley asked Roy to sit on his lap while Hadley was driving; (2) Hadley tried to get Roy to remove his pants; and (3) Roy felt Hadley getting an erection while Roy was sitting on Hadley's lap. In light of this evidence, together with the similar sexual abuse that occurred a month before, a rational jury could have found beyond a reasonable doubt that Hadley intended to engage in a sexual act with Roy. Furthermore, a rational jury could have concluded that Hadley's actions constituted sufficient steps "in the course of conduct planned to culminate in the commission of the crime." *Runco*, 873 F.2d at 1232. Thus, there was sufficient evidence to support Hadley's conviction on count eight.

V

[12] Finally, Hadley contends that the district court erred by imposing a sentence not in accordance with the Sentencing Guidelines for his conviction on count seven. The district court did not apply the Sentencing Guidelines in imposing a 30-year sentence on that conviction. The court did follow the Sentencing Guidelines when it sentenced Hadley to nine years in prison on counts eight and nine.

Hadley's contention is without merit. We have held that the Sentencing Guidelines do not apply to conduct that occurred before November 1, 1987. *United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 2168, 109 L.Ed.2d 497 (1990). There is no dispute that the conduct underlying the count seven conviction occurred in October 1987, prior to the effective date of the Sentencing Guidelines. Thus, the district court did not err when it declined to apply the guidelines to count seven.

AFFIRMED.

STATE OF NEVADA, Plaintiff-Appellant,

v.

Robert F. BURFORD, Director of Bureau of Land Management, Department of Interior; Edward F. Spang, Nevada State Director, Bureau of Land Management, Department of Interior, Defendants-Appellees.

No. 89-15272.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 16, 1990.

Decided Nov. 14, 1990.

State of Nevada brought action challenging Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository. The United States District Court for the District of Nevada, Philip M. Pro, J., dismissed action, 708 F.Supp. 289, and State appealed. The Court of Appeals, Wallace, Circuit Judge, held that Nevada failed to show that it would suffer concrete and immediate injury as result of grant of right-of-way, and did not have standing to challenge grant.

Affirmed.

1. Federal Courts ⇐557

Where district court has inadvertently neglected to dismiss action but it is clear it intended its order to terminate action, Court of Appeals treats action as dismissed.

2. Federal Courts ⇐555

Order which dismissed complaint but which did not dismiss underlying action was appealable, where it was clear that ruling by district court was meant to be dispositive of action. 28 U.S.C.A. §§ 1291, 1331.

3. Federal Civil Procedure ⇐103.1
Federal Courts ⇐12

"Case or controversy" limitation in article III of the Constitution requires that federal courts visit threshold question of standing in every federal case; in order to clear this jurisdictional hurdle, complaining party must demonstrate injury in fact. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Health and Environment ⇐25.15(4)

State of Nevada failed to show that it would suffer concrete and immediate injury as result of Bureau of Land Management's grant of right-of-way to Department of Energy to conduct site characterization study of proposed nuclear waste repository, and did not have standing to challenge grant; land was owned by federal government, and State did not allege that it used site for

NOT FOR PUBLICATION

FILED

SEP - 9 1991

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- VERL HADLEY, Defendant-Appellant.	No. 89-10428 D.C. No. CR-88-0127-EHC ORDER DENYING REHEARING

Appeal from the United States District Court
for the District of Arizona

Before: WALLACE, Chief Judge, ALARCON and WIGGINS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. An active judge called for an en banc vote, and a majority of the judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

SEP 11

RULE 403. **EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 404. **CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness.** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

MOTION FOR APPOINTMENT

OF COUNSEL

Verl Hadley was represented by the undersigned counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the Court of Appeals for the Ninth Circuit and by appointed counsel before the district court. Mr. Hadley, by and through counsel, has applied to proceed before this court in forma pauperis. Mr. Hadley, through counsel, also requests that the undersigned counsel be appointed to represent him in all proceedings before this Court and, in addition, requests an order appointing counsel nunc pro tunc for purposes of preparing and submitting the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John [illegible]
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773
Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to Title 18 U.S.C. §3006A(d)(6) and Rule 39 of this Court, Petitioner, Verl Hadley, requests leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed pursuant to Title 18 U.S.C. §3006A(d)(6) in the district court and on appeal to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Dated: December 5, 1991

John Trebon
601 N. Humphreys
Flagstaff, AZ 86001
(602)774-2773

Attorney for Petitioner

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VERL HADLEY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PROOF OF SERVICE

STATE OF ARIZONA)
) ss
County of Coconino)

John Trebon, being first duly sworn, deposes and states that he is a member of the Bar of the Supreme Court of the United States; that on December 5, 1991, the petition for writ of certiorari in the above entitled case was deposited in a United States post office mail box located in Flagstaff, Arizona, with priority postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said petition for writ of certiorari, with additional copies of the petition and affidavit of mailing to counsel for respondent and the Solicitor General, Department of Justice:

United States Attorney
230 N. 1st Ave., 4th Flr.
Phoenix, Arizona

Solicitor General
Department of Justice
Washington, D.C. 20530

Dated this 6th day of December, 1991, in Flagstaff, Arizona.

John Trebon, Affiant

SUBSCRIBED & SWORN to before me this 6 day of December, 1991, by John Trebon.

Sue Eaton
Notary Public

My Commission Expires:

MY COMMISSION EXPIRES JUNE 5, 1992

No. 91-6646 (3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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VERL HADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

12 pp

QUESTION PRESENTED

Whether petitioner's prior acts of sexual abuse and sodomy were properly introduced in a prosecution for aggravated sexual abuse and abusive sexual contact to show that petitioner acted with the requisite specific intent.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-6646

VERL HADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 848-854) is reported at 918 F.2d 848.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990, and a petition for rehearing was denied on September 9, 1991. The petition for a writ of certiorari was filed on Monday, December 9, 1991, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of three separate offenses involving a minor Indian child: aggravated sexual abuse, 18 U.S.C. 1153, 2241(a)(1), attempted aggravated sexual abuse, 18 U.S.C. 1153, 2241(a)(1), and abusive sexual contact, 18 U.S.C. 1153, 2244(a)(2). The district court sentenced petitioner to 30 years' imprisonment on the aggravated sexual abuse count, to be followed by a prison term of 108 months on the remaining two counts. The court of appeals affirmed. Pet. App. 848-854.

1. Petitioner was a 42-year-old grade school teacher at the Bureau of Indian Affairs School at Chilchinbeta, Arizona, within the Navajo reservation. An 11-count superseding indictment charged that petitioner committed improper sexual acts on several male victims between 1985 and 1988. The district court, accepting petitioner's claim that he would be prejudiced by raising consent as a defense to some but not all of the charges, granted petitioner's pretrial motion to sever various counts. See 4/27/89 Tr. 9. Petitioner ultimately went to trial on five counts and was convicted on three of those counts.

The evidence at trial showed that, on three occasions in 1987 and 1988, petitioner committed improper sexual acts on Amadee Roy, a 13-year-old male student. The first incident occurred in October 1987 after petitioner had taken Roy swimming in the nearby community of Kayenta. Roy testified that, although he was only 12 years old at the time, petitioner had permitted him to drive the

car home while seated on petitioner's lap. As Roy was steering the car, petitioner instructed him to pull down his pants, whereupon petitioner inserted his penis into Roy's anus. Gov't C.A. Br. 7.

The second incident occurred the next month and followed a nearly identical pattern. Petitioner took Roy swimming in Kayenta and again permitted him to drive home seated on petitioner's lap. Petitioner similarly instructed Roy to pull down his pants and Roy felt petitioner's penis become erect. This time, however, Roy got off petitioner's lap and returned to the passenger side of the car before anything further happened. Gov't C.A. Br. 7-8. The third and final incident occurred on February 1, 1988, following a class swimming trip to Kayenta. Petitioner brought Roy to his mobile home in Baby Rocks on the way back and invited him in to change his "wet socks." Once inside, petitioner gave Roy a soft drink, put a movie in the VCR, and proceeded to rub lotion on Roy's body. Petitioner then forced Roy to remove his shorts and rubbed lotion on Roy's penis. Gov't C.A. Br. 8.

The government also introduced evidence, as part of its case-in-chief, that petitioner had committed similar acts on Cory Kay in 1985. Kay was 15 years old at that time. Kay testified that petitioner had invited him to petitioner's home, where he put lotion on him in much the same manner as he did with Roy, and then proceeded to sodomize him. Kay also testified that petitioner subsequently had committed sodomy upon him on 10 or 20 occasions. Gov't C.A. Br. 9.

The district court admitted that testimony. It concluded that the testimony was relevant to "the intentions or motive that [petitioner] would have had in touching the minor children." RT IV 682. The court also determined that the evidence was not subject to exclusion under Rule 403, which requires a weighing of the probative value of the testimony against its potential for unfair prejudice or confusion. Id. at 684. The court explained that the testimony would help the jury evaluate the motives behind petitioner's actions, including his "interest in children, his willingness to help, in a sense his neighborliness or school teaching character, [and] the suggestion that the lotion involving Amadee Roy was simply a post[-]swimming skin tone." Id. at 685.

After the government closed its case-in-chief, petitioner presented several defense witnesses, and petitioner himself testified. The government then offered a rebuttal witness, Kyle Hartman, who testified concerning several instances in which petitioner had sodomized him. The sexual acts began in 1972 or 1973 when Hartman was a 10-year-old student in the fifth grade of a school at which petitioner was then a 24-year-old teacher's aid. Petitioner invited Hartman to his house for dinner, and proceeded to fondle his penis. On subsequent occasions, the last of which occurred when Hartman was a 15-year-old high school freshman, petitioner engaged Hartman in acts of sodomy. Gov't C.A. Br. 10-11.

The district court instructed the jury that the testimony of witnesses Kay and Hartman was being admitted for the limited

purpose of assisting the jury in determining petitioner's intent and motive with respect to the alleged offenses. The jurors were instructed that they could use the prior acts evidence to evaluate petitioner's intent and motive only if they first found that the evidence established beyond a reasonable doubt that petitioner had committed the acts charged in the indictment. Pet. App. 852.

2. The jury convicted petitioner on the three counts involving actual or attempted sexual acts upon Roy, but acquitted him on two other counts alleging that he had touched the penises of two other minor Indian boys. The court of appeals affirmed. Pet. App. 848-854. The court rejected petitioner's contentions that expert testimony had been improperly admitted, id. at 852-853, that the evidence was insufficient on the count charging attempted aggravated sexual abuse, id. at 853-854, and that petitioner received an improper sentence, id. at 854.

The court of appeals also held that the district court did not abuse its discretion in admitting the prior act evidence. Pet. App. 850-852. The court held that evidence that petitioner had previously abused and sodomized other children was adequately proved, was not too remote in time, and was sufficiently similar to the charged offenses to warrant its admission. Id. at 851. The court further held that the evidence of prior activities "of a sexually gratifying nature" was introduced to prove a material element in the case, because the government was required in all three counts to demonstrate that petitioner had acted with the "specific intent" of seeking sexual gratification. Ibid.

The court rejected petitioner's claim that his offer to stipulate to specific intent (in the event the jury concluded he had committed the charged acts) rendered the prior acts evidence irrelevant and unfairly prejudicial. The court explained that petitioner "cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime" and that his "choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means." Pet. App. 852. The court concluded that the prior acts evidence was "highly probative" and that, in light of the limiting jury instruction, the probative value of the evidence outweighed any danger of unfair prejudice. Ibid.

ARGUMENT

Petitioner renews his challenge to the district court's admission of the prior act evidence. He contends that the district court should have excluded that evidence, which was admissible to show his intent, because he was willing to stipulate that if he committed the charged acts, he acted with the requisite intent. This Court's recent decision in Estelle v. McGuire, 112 S. Ct. 475 (1991), resolves that issue adversely to petitioner. Further review of petitioner's otherwise fact-bound challenge is not warranted.

1. To prove the offense of abusive sexual contact, the government was obligated to show that petitioner intentionally touched the genitalia of Amadee Roy "with an intent to abuse,

humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. 2245(3) (defining "sexual contact" for purposes of 18 U.S.C. 2244). Similarly, to prove the offense of attempted aggravated sexual abuse, the government was obligated to show that petitioner acted with the specific intent of committing a sexual act when he had Roy sit on his lap while driving his car. See Pet. App. 853 (citing United States v. Beezer, 900 F.2d 177, 179 (9th Cir. 1990)).

The government's evidence that petitioner had committed prior acts of genital-touching and sodomy was plainly relevant to the material issue of petitioner's intent at the time of the alleged acts. See Fed. R. Evid. 401, 402. The evidence was not subject to exclusion under Fed. R. Evid. 404(b), because it was offered for a purpose other than "to prove the character of a person in order to show action in conformity therewith." And the district court did not abuse its discretion in concluding, under Fed. R. Evid. 403, that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See generally Huddleston v. United States, 485 U.S. 681, 691-692 (1988).

Any risk that the jury might use the prior acts evidence for an improper purpose was minimized by the district court's specific limiting instructions, which explained that the prior acts were not to be considered unless the jurors first found that the evidence established beyond a reasonable doubt that petitioner had committed the acts charged. This Court has "applied in many varying contexts" the "almost invariable assumption of the law that jurors

follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206 (1987). Accord Yates v. Evatt, 111 S. Ct. 1884, 1893 (1991) (referring to the "sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given").[1]

2. Petitioner nevertheless asserts that, because he offered to stipulate to his specific intent of seeking sexual gratification in the event the jury determined that he had committed the charged acts, the district court abused its discretion in admitting the prior acts evidence. He contends (Pet. 11-19) that various lower court decisions allow a defendant to preclude admission of prior acts evidence by "affirmatively act[ing] to remove the issue of intent from the case." Pet. 13. This Court, however, recently rejected a nearly identical argument in Estelle v. McGuire, supra.

In McGuire, the respondent was convicted of murdering his infant daughter. The Ninth Circuit reversed the conviction on the ground that the district court had admitted evidence that the child had previously been battered. It reasoned that the admission of the evidence was improper "because there was no evidence linking McGuire to the prior injuries and no claim made at trial that [the

[1] Petitioner also notes (Pet. 8-9) that the prosecution cross-examined him about such facts as whether he tickled his male students, brought them to his residence, and had received a traffic citation for allowing an unauthorized minor to drive his car. The district court allowed that cross-examination as responsive to the testimony of petitioner or other defense witnesses, see Fed. R. Evid. 611(b), as specific instances of conduct probative of petitioner's truthfulness, see Fed. R. Evid. 608(b), and as impeachment by contradiction, see J. Weinstein and M. Berger, Weinstein's Evidence ¶ 607[05], at 607-76 to 607-89 (1991). Petitioner does not directly challenge those rulings.

infant] died accidentally." 112 S. Ct. at 477. This Court reversed the Ninth Circuit's decision, explaining that the lower court ruling "ignores the fact that the prosecution must prove all the elements of a criminal offense beyond a reasonable doubt." Id. at 480. The Court specifically stated that "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." Id. at 481.[2]

Thus, even assuming that there is conflicting language among lower court decisions on the issue that petitioner presents, this Court's decision in Estelle v. McGuire puts any such conflict to rest. The Court's reasoning in McGuire is virtually identical to the reasoning of the court of appeals in this case. See Pet. App. 852 (petitioner's "choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means"). Indeed, petitioner contended in the court of appeals that the panel decision was inconsistent with the Ninth Circuit's decision in McGuire. See Pet. for Reh. and Sugg. for Reh. En Banc, at 11. The Court has eliminated that inconsistency, and no further review is warranted.

[2] Although McGuire was decided as a matter of due process and overturned a writ of habeas corpus that had been granted in a state prosecution, the Court's reasoning is fully applicable to this case. Indeed, the Court based its reasoning on the fact that "[i]n the federal courts '[a] simple plea of not guilty ... puts the prosecution to its proof as to all elements of the crime charged.'" 112 S. Ct. at 481 (quoting Mathews v. United States, 485 U.S. 58, 64-65 (1988)). It found no "reason to think that the rule is different in California." Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SEAN CONNELLY
Attorney

FEBRUARY 1992

Supreme Court, U.S.
FILED
MAY 5 1992
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No. 91-6646

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

VERL HADLEY,
Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 9, 1991
CERTIORARI GRANTED MARCH 2, 1992

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RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
3/30/88	Criminal complaint filed against Mr. Hadley before United States Magistrate, District of Arizona
4/5/88	Mr. Hadley released with special conditions, including third party custody
4/27/88	Original indictment filed against Mr. Hadley (CR-88-00127-01)
5/11/88	Arraignment
11/7/88	Government's motion in limine to permit evidence of defendant's prior bad acts (CR44)
12/7/88	Mr. Hadley's response to motion in limine to permit evidence of defendant's prior bad acts filed (CR50)
12/21/88	Superceding indictment filed against Verl Hadley
1/4/89	Arraignment on superceding indictment
1/23/89	Mr. Hadley's motion to severe counts of the superceding indictment (CR59)
4/27/89	Defendant's motion to sever counts of the superceding indictment granted (CR100)
5/2/89	Jury trial begins
5/8/89	Government's motion in limine to permit evidence of defendant's prior bad acts granted per telephonic conference
5/15/89	Mr. Hadley's supplemental memorandum in opposition to government's motion in limine to permit evidence of prior bad acts under Rule 404(b) filed (CR117)
5/18/89	Jury trial completed. Jury verdict of guilty on Count Seven, Eight and Nine of the superceding indictment; jury verdict of not guilty on Counts Ten and Eleven of the superceding indictment

Date	PROCEEDINGS
8/21/89	Mr. Hadley sentenced to imprisonment for a term of thirty years on Count Seven of the superceding indictment, plus a fine of $10,000. Mr. Hadley's sentenced to imprisonment for a term of 108 months on Counts Eight and Nine of the superceding indictment, plus a fine of $10,000, as well as, a term of supervised release of 60 months upon Mr. Hadley's release. The sentence imposed on Counts Eight and Nine of the superceding indictment shall run consecutive to the sentence imposed on Count Seven
8/25/89	Notice of appeal filed by Mr. Hadley

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR-88-127-PCT-EHC

UNITED STATES OF AMERICA,
Plaintiff,

v.

VERL HADLEY,
Defendant.

VIO: 18 U.S.C. §§ 1153 &
ARS 13-1406, 13-1401
(Involuntary Sodomy)
6 Counts

18 U.S.C. §§ 2241(a)(1)
(Aggravated Sexual Abuse)
2 Counts

18 U.S.C. § 2244(a)(1) & (2)
(Abusive Sexual Contact)
2 Counts

18 U.S.C. § 1153 &
ARS 13-1410
(Child Molestation)
1 Count

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about September, 1986, at approximately 11:00 p.m., in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did in-

tentionally and knowingly engage in involuntary sodomy, to wit: anal intercourse with Travis Yazzie, an Indian, without the consent of Travis Yazzie.

In violation of Arizona Revised Statutes 13-1406, 13-701, 13-801, a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT II

On or about September, 1986, at approximately 1:00 a.m. and immediately subsequent to the indictment contained in Count I, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse with Travis Yazzie, an Indian, without the consent of Travis Yazzie.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801 a Class 2 felony and Title 18, United Code, Section 1153.

COUNT III

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, with Cory Kay, an Indian child, while Cory Kay was lying on his stomach, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801 a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT IV

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL

HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, Cory Kay, an Indian child, while Cory Kay was lying on his back, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701 and 13-801, a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT V

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, with Cory Kay, an Indian child, while Cory Kay was on his hands and knees, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801 a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT VI

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, with Cory Kay, an Inidan child, while Cory Kay was seated on Hadley's lap, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801, a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT VII

On or about October, 1987, in the District of Arizona, within the confines of the Navajo Indian Reservation,

Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, knowingly caused and attempted to cause Amadee Roy to engage in a sexual act, to wit; penetration of the anal opening, by using force against Amadee Roy.

In violation of Title 18, United States Code, Sections 1153 and 2241(a)(1).

COUNT VIII

On or about November, 1987, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, attempted to cause Amadee Roy to engage in a sexual act, to wit; penetration of the anal opening, by using force against Amadee Roy.

In violation of Title 18, United States Code, Sections 1153 and 2241(a)(1).

COUNT IX

On or about February 1, 1988, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, knowingly engaged in sexual contact, to wit; intentionally touching the genitalia of Amadee Roy, an Indian child, twelve years of age, and at least four years younger than VERL HADLEY.

In violation of Title 18, United States Code, Section 2244(a)(2).

COUNT X

In about October, 1986, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Chilchinbeto, Arizona, VERL HADLEY, an Indian, knowingly molested Jonathan Tsosie, an Indian child under the age of fifteen years, by directly touching his private parts, a class 2 felony dangerous crime against children.

In violation of Arizona Revised Statutes Sections 13-1410, 13-1401, 13-604.01, 13-701, and 13-801, Title 18, United States Code, Section 1152.

COUNT XI

On or about May, 1988, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Chilchinbeto, Arizona, VERL HADLEY, an Indian, knowingly engaged in and caused sexual contact with Fernando Yazzie, an Indian child who had not attained the age of twelve years.

In violation of Title 18, United States Code, Section 2244(a)(1).

A TRUE BILL

/s/ Cicily A. Rhue
Foreman of the Grand Jury

Date: 12-21-88

STEPHEN M. MCNAMEE
United States Attorney
District of Arizona

/s/ Gary A. Husk
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 88-127 PCT EHC

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VERL HADLEY,
Defendant.

TELEPHONE CONFERENCE

* * * *

[2]

Phoenix, Arizona
April 27, 1989

PROCEEDINGS

THE CLERK: CR 88-127, United States of America versus Verl Hadley, hearing re pending motions.

THE COURT: All right, Mr. Trebon?

MR. TREBON: Yes, Judge.

THE COURT: And we have Mr. Husk here with us.

MR. TREBON: Okay.

THE COURT: Say hello, Mr. Husk.

MR. HUSK: Hello, Mr. Husk.

THE COURT: Well, I have been looking at our—the motions that we have had. We did enter an order yesterday, I believe. Nothing that was unexpected I am sure. We have entered an order dening your motion to dismiss, not with respect to vindictive prosecution, we are going to have an evidentiary hearing on that. But we have allowed the Government to amend those counts that we discussed, so you will have a copy of that order and I don't think that is any big problem that we have.

What I have been concerned with more is, looking at the various counts involving Mr. Hadley, and the implications of the number of counts, and what they are involved with, and trying to do what is right, as well as looking at it from an appellate standpoint, depending on what happens in the future.

[3] And I have—of course, Mr. Husk has just come in, I have not written any orders about the matters. I wanted to visit with everyone about it.

My tentative thoughts are, Mr. Husk and Mr. Trebon, that the case probably ought to be generally divided along the lines that it started out. And, that would involve Travis Yazzie and Cory Kay, in one combination. And the Amadee Roy, and Jonathan Tsosie, Fernando Yazzie, in the other things, other counts.

And so, I have tried to analyze it from the—kind of the issues that we would have, also giving thoughtful consideration to your avowal that Mr. Hadley intends to testify in the Cory Kay case.

MR. TREBON: I may need to amend that with you somewhat.

THE COURT: And that he—also, his general defense, otherwise, is lack of—or that it just didn't happen.

Here is the rationale that I have gone through. I think that, if, for instance, and I will invite Mr. Husk's, at least, option as to which of the series we would try first.

But I think, in the counts starting at Count 7, I believe, it is 7, 8, 9, 10, 11, that essentially, with one exception, they all involve a touching situation, or a contact situation. And so, I would think that if those counts were tried together, they are similar in character.

[4] And I think that prior bad acts, or prior acts, depending upon the circumstances of those acts, would be admissible in those counts involving the people that we have just named as to the intention, motive, plan, whatever, of making these touchings and contacts, and what the context of them were.

And, so that is the reason I put them all together and separated them from the first two.

I think, insofar as Yazzie is concerned, and Cory Kay, they are a, if nothing else, a lack of consent, involuntary force situations, and I think that, for instance, if you only tried Cory Kay, Travis Yazzie incidents would be admissible there, as other acts or vice versa.

And it seems to me that there is no demonstrated prejudice in trying those two victims together. And that the purposes of Rule 404(b), with respect to the different—admissibility of—and relationship of those acts, in looking at 403, Rule 403, with respect to the probative value outweighing the prejudicial effect, it seems to me clear that either one of those first two victims would be admissible, if you were only trying the other one alone.

And as I say, trying them both together, I think—I don't find that that would be unduly prejudicial.

So that is my tentative thoughts and I wanted to get your thoughts about that approach and what it might do to our [5] time in Prescott, and who might be necessary there and also to give that same opportunity to Mr. Husk.

So perhaps let's get Mr. Husk's reaction first, Mr. Trebon, and then yours.

Mr. Husk?

MR. HUSK: Thank you, Your Honor.

First of all, Your Honor, it would be the Government's position that, given that scenario which the Court indicated, the only major problem that the Government has, is that it would involve the testimony of witnesses on two separate occasions, basically, in two separate trials.

Obviously, the Government is concerned, in this type of case where children are very reluctant to come forward at all, and then to have to come into the courtroom on two separate occasions, it is the Government's contention that that places an unusual amount of stress and

an unusual amount of trauma on the child that is not necessary.

I know that there have been cases cited to that effect, certainly within the State of Arizona and, in fact, the United States Supreme Court, in the Coy versus Iowa decision, that address similar issues.

And basically, although it dealt with a—not necessarily videotape testimony, but the testimony of children whereby they are obstructed from view of the defendant. There were some similar concerns that were articulated by the United [6] States Supreme Court that are equally applicable in this particular situation, in that, specifically, the Court indicated that these type of cases are somewhat different and where the—whether it be in State or the Government, is in a position to provide the Court with information as to an individualized need for any unusual circumstances, or any unusual trauma that may be exhibited by requiring us to do so. That in those particular instances, the Court would be in a better position to make an individualized finding regarding those types of issues.

And it is the Government's concern, Your Honor, quite frankly, that, in this type of situation, where you have young boys that are extremely reluctant to go forward with their testimony, that requiring them to commit that —or to come in and commit themselves to going on the witness stand, and subjecting themselves to cross-examination not once, but twice, is very—a very traumatic experience for the particular witness.

And particularly, Your Honor, in view of the fact that depending on, again, which case the court hears that that information is going to come before the jury in the context of prior bad acts, anyway. So that it is not accomplishing anything as far as precluding information from the jury, because as the Court has indicated, in a particular situation, those type of prior bad acts would be admissible.

[7] So it is the Government's contention that, in view of the fact that the jury would hear that type of information anyway, that the only thing that that type of

severance would do would be to require the children to testify twice. And obviously, the Government is very opposed to that notion.

THE COURT: The only ones, under my viewpoint, Mr. Husk, that would have to testify twice would be Kay and Travis Yazzie.

MR. HUSK: That's correct, Your Honor.

THE COURT: And the others would not.

MR. HUSK: That's correct.

THE COURT: Well, I think that, given those circumstances, that that is really not something that justifies trying them all together. Because if that was true, you would try all child molestation cases together, regardless of how many victims there were. And I suppose that has been done, but in any event, it just seems to me that, looking at it realistically, the case can be divided in that way and that they are the only ones that would have to testify. Their testimony would be a matter of record once. The same lawyer, same defendants, and if something did happen to them, even, why then I would think that, apart from the credibility arguments, the evidence would be there for the second trial. All the confrontation issues would have been resolved.

So, your thought, Mr. Trebon?

[8] MR. TREBON: May I ask a question for clarification?

THE COURT: Yes.

MR. TREBON: I'm not sure, under the Court's analysis, why Yazzie and Kay would have to testify twice, because I thought the Court indicated that prior bad acts involving touching would be admissible against the counts involving Roy, and Jonathan Tsosie, and Fernando Yazzie, but not prior sodomy.

THE COURT: No. The touching was leading up to the sodomy, i.e., it is relevant, I think, for what the sexual context of it and what Mr. Hadley would have been touching them about.

And, so what I said was, that in the—in the Amadee Roy on down, that the prior bad acts involving Cory

Kay and Travis Yazzie would be—my ruling now would be admissible in those other cases. And then I would have to look at it, of course, and make any final ruling during the trial. But that is the basis upon which I would be severing them.

MR. TREBON: I see. I guess my initial reaction is—I am having trouble seeing what the benefit of the severance is, if all the same evidence is going to come in anyway.

THE COURT: Well, it isn't all going to come in, you see, with respect to Mr. Kay and Mr. Yazzie.

MR. TREBON: Oh, I see. When they are tried, then, the prior bad acts involving Roy, Jonathan Tsosie and Fernando [9] Yazzie would be admitted. Is that right?

THE COURT: When Amadee Roy, et. al., are tried, the prior bad acts involving Kay and Yazzie, I believe, would be admissible. And that would be my tentative ruling, subject to whatever occurred during the trial that might suggest to the contrary.

MR. TREBON: I see. But not the other way around then?

THE COURT: That's right. Because these others are not force and consent issues. Perhaps one with Amadee Roy, that is, using force in an attempt to, whatever. And that seems to be an intentional touching.

Are you suggesting we join that with Kay and Travis?

MR. TREBON: No. I'm sorry, which one?

THE COURT: The first count involving Amadee Roy is a force, lack of consent, isn't it?

MR. TREBON: No. I think that the way you have divided them is more intelligent than putting Roy back up with Travis and Cory Kay. I think the way you have done it, that makes sense to me. I'm not suggesting that you change that.

The only thing, I guess, I would suggest is that I would have no objection to adding Travis Yazzie to the second list, and keeping Cory Kay by himself.

And the only reason I do that is because our defense involving Cory Kay is inconsistent with our defense on the other counts.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

TRIAL PROCEEDINGS

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[659] MR. HUSK: Your Honor, under the Rule 404(b), the evidence of other crimes, wrongs or acts is not admissible normally to prove the character of a person. However, as the Court is aware, may be admissible for the purpose of proving a motive.

And in this particular instance, where we have other children, some of which are very young, the question of motive is obviously very important.

And opportunity, in this particular case, as well, the opportunity issue is also present.

The intent as required under the statute, the intent to engage in the sexual activity under the particular statutes, which the defendant is charged with, is also present in these acts to establish an intent on the part of the defendant to sexually abuse minors.

Preparation on the part of the defendant is also present, it would be the Government's contention.

And finally, Your Honor, it would also establish that [660] this was not just a one time occurrence, this was not a mistake, this was not an accident, this was knowledge—it establishes knowledge on the part of the defendant with regards to these particular acts and therefore the Government would move for the admission of these acts.

Particularly given the fact that some of these young boys who have testified are of such a young age that this type of evidence and this type of prior bad acts would be

extremely probative in helping the jury determine whether or not the defendant used, in fact, the same method for his conduct and therefore committed the acts in question.

MR. TREBON: Your Honor, I believe the Government's argument today by far exceeds the argument it made originally in its original motion.

I think it argued motive and intent in the original motion, but even all of the reasons they offer now, which is the kitchen sink full of reasons—

THE COURT: Pardon?

MR. TREBON: Almost as if the kitchen sink full of reasons, I think is inadequate under 404(b). 404(b) explicitly states that prior bad acts cannot be admitted to show that the defendant acted in accordance with any propensity to do these acts on any particular occasion.

But yet that is exactly what would be the overwhelming effect of this evidence.

[661] The defense, I think, has pretty much hinted that throughout the Government's case so far and certainly it will be our defense when we present evidence, is that these children were influenced to say things about Mr. Hadley that weren't true. They were influenced to say things about Mr. Hadley that didn't happen.

We are never going to argue that sure Mr. Hadley inserted his penis in somebody's anus, but he did it innocently.

THE COURT: Well, you see, whether he did it innocently or not, the fact that he did it, and arguably attempted to do it here, or why he's touching these boys and doing these things, that, it seems to me, is the reason, if there is one, to admit these other acts.

Now, Mr. Hadley at least is—there is evidence of—evidence that you presented, that he was touching the boys' penises. One boy twice. That he had them on his lap. That the other—the first witness we had touched his penis. The second witness, he was either pinching or touching, et cetera.

Now, why is he doing these things? His acts with these other people, arguably, would tell the jury what his intention was, what his motive was, why he was doing these things with these three victims, alleged victims, that we are discussing.

MR. TREBON: Taking them one at a time, Jonathan Tsosie testified through the tape in his admission that the tape was [662] correct, that he was pinched on the arm and the leg. Pinching him on the arm and the leg doesn't constitute a crime.

THE COURT: It is going to be something for the jury to consider in light of Dr. Rozensweig's testimony that's coming up, as to the pattern of people and whether they change their stories and all of those kind of things. It is going to be up to the jury to decide which statement of Jonathan Tsosie's was correct.

MR. TREBON: That's correct, Your Honor. The point is that, I believe that there is no question that if somebody touches somebody else's penis, there is a sexual motive in it. We are not going to ever argue otherwise.

So the motive to touch someone's penis is not in question. The question is whether or not he, in fact, touched someone's penis. Our defense is that he did not.

THE COURT: Well, if he's going around touching other people's penises or doing different things, that is some evidence that he would be touching these people's penises for certain reasons, wouldn't it?

MR. TREBON: It would be very good evidence of that. In fact, the propensity evidence, however, it shows that he has propensity to do that. And that is exactly why you can't admit it under Rule 404. But there is other reasons why it should not be admitted as well. It is never that it is not relevant to admit under Rule 404.

[663] THE COURT: There has to be a balancing test and that is what I am going to do. Balancing I think—

MR. TREBON: The reason it is excluded is because it is considered too relevant.

THE COURT: The balancing is under Rule 403.

MR. TREBON: That's correct, Your Honor. But the reason that it is excluded under 404(b) is that it is deemed far too relevant, that that juries will convict based upon that pattern of conduct alone and not guiit proven on any specific instance that is being tried.

Here, not only are—the prior bad acts show propensity, but they are far more egregious in nature than the acts that are on trial.

If they come in, the fact that there was homosexual sodomy relations with these people, allegedly over a period of time, far overshadows the allegations that are being tried before the Court now.

If they come in, it is telegraphing a clear message of propensity to the jury that would never be able to be controlled with any instructions, that would overshadow the case completely and it will undoubtedly result in a conviction, based alone on those prior acts, if they are believed.

Number two, they certainly are going to result—the evidence relating to those next two people is greater than all [664] the evidence that we have seen so far or that we will see in this trial. The trial of those other bad acts is far more complicated, extensive, involves numerous more witnesses than this trial has.

So we will have a far greater trial on the prior bad acts than we will on the act in question itself. It will simply overshadow this case.

Cory Kay—I don't know if the Court is aware of all this, but I would like to briefly outline it.

Number one, both Travis Yazzie and Cory Kay involve allegations that occurred several years ago. They are not recent activity.

Cory Kay's incident in 1985, September 5th of 1985, four counts relating to September 5th is contained within the indictment. That was investigated by the Navajo Division of Public Safety back in 1985.

And they determined there wasn't sufficient evidence to bring charges. So, we have an old investigation, we have

police officers investigating it back then that would have to come in.

According to the police officers, Cory Kay refused to testify then. Cory Kay has a very bad reputation in terms of truth and veracity. We have a lot of witnesses to bring in about that.

Cory Kay's motive for reporting those incidents is [665] highly in question. We have many witnesses to bring in about that.

In fact, I believe the evidence would show that the police contacted him about raping a 14 year old girl and when he was talking about raping the 14 year old girl, he reported that he had been molested by Mr. Hadley.

In fact, he admitted that he had raped a 14 year old girl to the Doctor that saw him, he tried to determine if there was physical evidence that he had been sodomized.

He talked about—in the police department from the Navajo Division of Public Safety, he says there are several suspects, Morris Singer was a suspect, Arnold Dohi was a suspect, they are all listed as suspects in the Navajo Division of Public Safety.

THE COURT: Suspect of what?

MR. TREBON: Suspect of sodomizing Cory Kay. So who sodomized him, on what basis, is also going to be a substantial question.

It is going to far overshadow this case. The veracity of him is going to be a major question and numerous witnesses on both sides will have to be called in.

Prior inconsistent statements abound. It would—even if the Court finds that it is admissible for some purpose under 404(b), the prejudice involved in Cory Kay far outweighs the probative value, at least that is our position. We would [666] like the Court to consider that.

It would just be absolutely devastating to have to deal with that case to pretend any more that the focus is going to be on the allegations that have been set forth so far.

Essentially the same argument applies to Travis Yazzie. It is a very complicated thing. He was interviewed several times by the FBI, very old allegations, again, ones that, in this case, were never reported until several years later. I think Travis Yazzie is very—

THE COURT: Pardon?

MR. TREBON: Travis Yazzie, to my understanding has made very inconsistent statements about it. I do not believe that the Government could establish, even by a preponderance of the evidence, let alone clear and convincing evidence that those allegations took place.

I have great doubt whether or not they would be able to do that with Cory Kay.

The trial in those cases will greatly outshadow this case.

THE COURT: I thought—pardon me, someplace I got the idea that the Cory Kay case, insofar as your client was concerned, was a consent issue.

MR. TREBON: There is a consent issue there, because as I understand it, he told some people involved in the case that he had a sexual relationship with Mr. Hadley and these other [667] people, Morris Singer and Arnold Dohi, I believe are the two other suspects, I will have to check the report to be positive, for a number of years.

THE COURT: What's that have to do with consent? Oh, I see, all right.

MR. TREBON: He talks about having consensual relationships for years. And, how can I, in this trial, try a prior bad act, argue a consent defense here, that shows that there is no prior bad act in terms of a crime, but by then we have emasculated any chance to impress that upon the jury.

It leaves us with propensity all over the place. I have an untenable defense to it at a trial of this nature.

I think that is why the Court severed it. On its own it is a viable defense, but it certainly isn't if it is being tried as a prior bad act.

I believe that there is grave doubt about whether or not it took place at all as well, simply because of the way in

which it was brought up, the investigation by the Navajo Division of Public Safety and Cory Kay's credibility.

But I think that we leave this trial and the allegations in this case clearly will open the door to pure propensity, if we get into that.

T- be honest with you, Judge, I have no chance of winning this case if you let those things in. I don't care what the allegations are here or what the evidence to date has [668] been with respect to those, if those prior allegations come in, any count on the indictment against Verl Hadley is gone. That is how devastating that other evidence would be.

And, it is—it would show propensity far more than it would show these other issues. And our defense is that they didn't take place in this case involving the younger children. It simply did not take place. Not that there was consent, not that there was innocent touching, simply that there was no touching. The touching on the arm and the leg is not a crime. So, those aren't in issue.

The question is whether or not he ever touched someone's penis. And we—our position is that he did not.

And the cases that the Government relies upon is—I think I talked about it extensively in my memorandum, but when I looked at, it is not the best written memorandum, but it has a lot of authority in it.

And those—the Government is essentially putting forth the position that is allowed under Arizona law, which is the emotional propensity exception, which is created only for sex cases and allowed by Arizona, and a few other states. It is an antiquated rule that was developed in the 1800's and has been around every since then.

But it has been eliminated by the Federal Rules of Evidence. It is not allowed by Ninth Circuit law or under any federal cases that I am aware of that the Government cited.

[669] That emotional propensity exception is a rule that Arizona clings to and there is a couple of Law Review articles that talk about it, Professor Imperwink (phonetic), if I ever pronounce his name correctly, who

wrote a book called On Charge of Misconduct Evidence, talks about the Arizona rule. I quote him extensively in my memorandum.

That is not a rule that exists Yn federal court. And, somehow I got the feeling that when I was reading Mr. Husk's memorandum, that federal law doesn't have as many sex cases, so you need to look to state law, which has more progressive law in this area, but that is just not the case, Arizona is clinging to an antiquated rule, not a new rule, not a developing trend.

It is a rule that is slipping away with time. And it is clearly not allowed under the federal rules of evidence. There is no exceptions now for sex cases that don't exist in any other case.

With all the persuasion that I can, I ask this Court not to allow that in. If—I don't believe it meets the threshold under 404(b). Even if it did, the prejudice is absolutely incredible and there would be no way to control that with any instructions, if it was allowed in.

In addition, it would require a trial on collateral issues that, by the time we are done, will far overshadow the issues that are being tried now.

[670] Mr. Hadley can be tried on those at a later time. I think, there is enough evidence here about whether or not these kids were improperly influenced to say things, or not. That should be the issue for this jury.

THE COURT: Well, the issue ought to be whether he did it or didn't do it.

MR. TREBON: Exactly.

THE COURT: And all of the collateral issues with the investigators and what the investigators wrote down or didn't write down is the issue that is going to become perhaps what you would like to see the major issue.

MR. TREBON: Well, Your Honor, whether he did it or not has to depend upon what people say he did.

THE COURT: That's right. And what they say and not what investigators wrote down, in my good judgment.

MR. TREBON: Exactly.

THE COURT: I think it was obvious today, when we had the first witness. If you raise your voice at him and say "What?" He changes his answer.

I will look at it this evening and tell you in the morning what we are going to do. I am—I will just have to look at it.

The jury ought to know what kind of a person Mr. Hadley is, because it relates to his motive for doing things, or his intention for doing things with these children.

[671] And, for the jury to know whether or not—and this gets back again to your argument about the propensity issue, does prior conduct by Mr. Hadley tell us that that is why he was doing things with these children and therefore it is relevant on that and more probative than prejudicial. That is really the question that I have to look at and decide.

MR. TREBON: Your Honor, it is not our position I advocate—

THE COURT: Otherwise we are going to be trying the agents and not the defendant and that is a popular pastime also.

MR. TREBON: Your Honor, we are trying what the kids really said and whether or not they have been influenced to say things. The FBI never tape recorded any of their interviews with them.

THE COURT: As far as I know you tape recorded one. Maybe you tape recorded more. I don't know. But in any event—

MR. TREBON: Your Honor, not of any of the witnesses that have been present here as far as I know.

THE COURT: Why wasn't Amadee Roy tape recorded?

MR. TREBON: I was speaking to him out in the middle of the country in the back of my truck and I didn't feel it was appropriate to tape record.

THE COURT: You can argue all that to the jury too, you [672] see.

In any event I will look at it this evening. Common sense tells me that the jury ought to know something about Mr. Hadley. And how they know that, I don't know, because it does deal with his motive, his intention and whether or not he was a good guy taking students to the swimming pool, or taking them home, et cetera.

And, on the other hand, I see some of the things that Mr. Husk wants to get into that weren't a part of what was going on here i.e. the alcohol, the intoxication, dirty movies, et cetera. We don't have any of those kind of things here.

MR. HUSK: Your Honor, I can certainly follow any restrictions that the Court places regarding any of those other activities.

THE COURT: Let me ask this, Mr. Husk, have you thoughtfully prepared a limiting instruction that I would use?

MR. HUSK: Yes, Your Honor, I have.

THE COURT: Is that in the things you have given us?

MR. HUSK: Yes, it is the identical instruction that was used in the Todd case as well.

THE COURT: We have all those here?

THE CLERK: Yes.

THE COURT: We will look at that.

MR. TREBON: Your Honor, this isn't the position I [673] would like to advocate, but I would just like to throw it out before we leave for the evening.

If the Court is inclined, and I hope it is not, after taking a hard look at the applicable law and the nature of the prior bad acts, which involve sodomy, I'm sure the Court knows that they are all sodomy, they are not touching, they are all sodomy counts, that at least if—that it would allow, I think Travis Yazzie is a much more simple issue to deal with than Cory Kay. I don't know why we have to have them both.

Certainly one of them tends less to overshadow the case than the other.

THE COURT: I don't know—what are the circumstances of Travis Yazzie? I don't recall right at the minute.

MR. HUSK: Your Honor, actually the circumstances involving Travis Yazzie verify what Amadee Roy has indicated regarding the lotion and so forth.

Cory Kay will indicate regarding the lotion, the sodomies, so they are very related.

I think the Court has already allowed—placed some restrictions on the Government's use of that in limiting the Government to advocate, at least in its case in chief, the positions or the bad acts relating to those counts in the indictment only, not the additional counts that were contained in our original motion for prior bad acts.

There are other counts out there as well, Your Honor. [674] I think to cut it off arbitratily as Mr. Trebon would submit is completely inappropriate.

MR. TREBON: Your Honor, it is a way to balance the 403 balancing, that you allow—if you are going to allow some prior bad acts, you don't have to allow them all in.

It is a way to temper prejudice somewhere, if you get to the point where you deem they are admissible. Admitting some and not the others is a way to engage in a balancing process.

MR. HUSK: I would agree, Your Honor. My contention is that that has already been done by the Court with regard to those other acts.

THE COURT: Well, as I say, I would—

MR. TREBON: Your Honor, may I make one other suggestion?

That if the Court—it may be a bit unusual, but if the Court could reserve a decision about whether or not it would allow these prior bad acts in until after we put on our defense, and then the Court would be in a far better position to judge whether or not we have opened the door to intent or motive or whether or not we have actually held the line.

THE COURT: Intent and motive doesn't depend upon what you do really. It depends upon the record that is presented.

MR. TREBON: There will be that much more of a record then.

[675] THE COURT: Well, we aren't going to have any more of a record regarding Cory Kay or Travis Yazzie. We are certainly not going to have any more of a record about that.

What other things are you thinking about?

MR. TREBON: I just meant the record in the case will be further developed as to whether or not those 404(b) reasons really exist any more or don't exist.

THE COURT: Why wouldn't they exist?

MR. TREBON: Because our defense may not touch upon them.

THE COURT: I don't know—I don't know that your defense has to touch upon them, but you seem to suggest it would.

MR. TREBON: Yes. If they are not contested issues in the case, why present evidence about it?

THE COURT: You have presented evidence now that would lead the jury to believe that Mr. Hadley, for instance, is dealing with these younger people, taking them home, doing these things, that is kind of the Todd approach, that he was just helping them out, getting them a pair of pants, taking them home, stopping by his house, picking them up, moving them around, that is all—that is intent and motive evidence why he was dealing with them. Isn't it? That is your intent and motive?

MR. TREBON: We have only presented evidence relating [676] to specific incidents in question.

THE COURT: Pardon?

MR. TREBON: We have only placed evidence in the record relating to the specific incidents in question, not his general character for doing anything.

THE COURT: All right. Well, in any event we will be some time with Dr. Rosenzweig. He is our first witness tomorrow?

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

TRIAL PROCEEDINGS

* * * *

[682]

Prescott, Arizona
May 5, 1989

PROCEEDINGS

THE COURT: Well, we are waiting for Dr. Rosenzweig, I assume, but before that, let me just briefly continue our discussion about prior acts, et cetera.

And, we spent some time last evening reading about those matters, and thinking about them. It seems clear that under Rule 404(b), that relevancy determinations can relate to a number of factors, including motive and intent, and it seems clear here that there are certain of the charges, at least, that involve intent or motive and they have to do, of course, with, among other things, Count 9, Count 11, and Count 10, at least insofar as there would be a lesser included offense there, having to do with the intentions or motive that Mr. Hadley would have had in touching the minor children.

And, intent, of course, is an element of 2244(a)(3). It specifically refers to with intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person.

And, 2245(1), includes the same reference with respect to intent. So, intent or motive is an element, I believe, with respect to those.

The prior acts that we were discussing and we will get [683] into a little bit of that discussion further, but

the prior acts have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature. So I think those acts, prior acts, would be relevant in the jury's consideration, not necessarily limited to whether Mr. Hadley did the acts, but his purpose in doing them as well.

And, so that that evidence doesn't—isn't limited, its admission would not be limited in the sense of the cases to simply showing that Mr. Hadley had bad character or criminal propensity.

Obviously, if Mr. Hadley was allegedly a homosexual and robbing a bank or stealing a car, that, in absence of some other circumstance clearly wouldn't relate to his intention or motive.

In deciding whether or not a prior act or other acts should be admissible, the similarity of the prior acts is a relevant consideration, i.e., the illustration as we discussed, the difference between a sexual act and a bank robbery, for instance.

And so one of the considerations then as to whether or not intent, motive, plan, would be overshadowed by the contention that its purpose was simply to show the propensity of the testimony to prove only criminal disposition. Under appropriate circumstances, I don't think it would.

And, of course, the cases tell us that in making the [684] 403 evaluations, or judgments, that is essentially whether or not the probative value of the evidence outweighs any prejudicial impact, there must be clear and convincing evidence of those other acts before they would be admissible.

Here, of course, there are a number of circumstances that arguably, if they had occurred before, would be relevant, I believe, and admissible, giving consideration to the 403 weighing, driving, sitting on laps, sit on my lap, going swimming, going home, getting the child into his house under some ruse, lotions, things like that.

And up until now, really, and I know we tried to approach it yesterday, after the jury was excused, I

really don't believe that there is any basis for me to make a clear and convincing determination.

I think that the nature of those activities would have to be shown specifically by some detailed offer of proof or by some testimony, so that the record would be clear and could be reviewed in that respect.

I would also believe that if any evidence is going to be admitted of those prior acts, then we would have to screen, or sanitize, I suppose, as much as possible, that evidence, so that, for instance, it simply wouldn't show the alleged activities of Mr. Kay on one evening that are in three of the counts, I think, or things like that.

So, it would have to be presented in some way that the [685] gross nature of the other acts simply wouldn't be so prejudicial as to inflame the jury.

So, those are my thoughts on it, how I perceive it and, of course, the Government can take what actions that they want to act or request, this is also an issue, of course, that can be considered now and evidence arguably could be permitted now, and I think in light of some of the cross-examination of witnesses by Mr. Trebon, that there are certain implications through that questioning.

One, having to do with Mr. Hadley's interest in children, his willingness to help, in a sense his neighborliness or school teaching character, the suggestion that the lotion involving Amadee Roy was simply a post swimming skin tone, things like that, are all there before the jury and have been put in for that purpose.

On the other hand, of course, the matter could come up, through rebuttal, and through any evidence that would be presented by the defense, that this evidence might relate to.

So without some further showing or record with respect to the clear and convincing and what it is, specifically, that we would be sending to the jury, apart from the gross acts described in the—in the first counts that have been severed, I would not find a basis for admitting those kind of facts, so that is where we are.

MR. HUSK: Your Honor, the Government is prepared to go [686] forward with—our preference would be to submit to the Court the FBI reports concerning the testimony of Cory Kay and Travis Yazzie.

I really don't think that there is any dispute as to what these individuals will say. I think that everything that has been said has come out and there is really no surprises. I would be prepared to submit those reports to the Court for consideration and then, certainly abide by whatever the Court's preference is, as far as sanitizing those statements and what areas we can get into.

It would be my preference to follow that procedure, particularly since that is not in dispute although there certainly is impeachable material there, but I would not—my preference would be not to go through another hearing just on those, although if that is the Court's preference we would be prepared to do that as well.

But I think to allow two—or to require these people to testify basically twice, would be inappropriate. Again we will follow that. The Government is prepared to go forward with whatever procedure the Court wishes to follow. We would like to do that as part of our case-in-chief.

THE COURT: Well, as I say, I'm not so much interested in the details of the final events as I am, seems to me the relevancy of the predicates, or any actions or procedures leading up to the final events, insofar as these people are [687] concerned.

It seems to me that is the consideration I should have.

Pardon me, Mr. Trebon.

MR. TREBON: Your Honor, two things, I don't think that submission of the FBI reports would allow this Court to make any conclusion about whether or not the evidence is clear and convincing.

I did think that there may be more surprises than Mr. Husk is anticipating. I don't think the evidence is as clear as he seems to say today.

Second of all, I was wondering if the Court, since this evidence is being apparently admitted to show sexual

intent, what if we stipulated that if the private parts of these individuals were in fact touched, that it was with a sexual intent.

And then simply have the issue about whether or not it occurred go to the jury. And that way we would officially eliminate that issue.

THE COURT: Well, you can discuss that with Mr. Husk. I would not require him to do that.

MR. HUSK: I would not be prepared to do that.

THE COURT: Let's do this, what I would prefer, at least initially, is the Government to specifically tell me what it is that someone is going to testify about as to the—lead up into these things.

[688] I don't want to read all about what happened on the dining room floor. I want to know how they got on the dining room floor and were they invited over, all of the evidence with respect to drinking and carousing, we don't have any of that kind of testimony here.

We don't have any testimony in this case about watching dirty movies, or things like that. I am interested in what I think would be persuasive, for my purposes at the moment, would be evidence about taking rides, getting on my lap, come over, let's go swimming, here is a little lotion, a pinch and a poke and the first thing you know it is go. That is what I am interested in, I think what the record is interested in, insofar as predicate to admitting evidence of other acts.

MR. TREBON: Your Honor, I think it is fair to say that none of the other cases do involve rides in cars or sitting on laps or any things like that, I think Mr. Husk would agree with that.

MR. HUSK: I can tell the Court specifically, if the Court wants me to.

THE COURT: Let's at least pass on for the moment. Where are we now? Do we have any other witnesses right now?

MR. HUSK: Your Honor, we would only have Dr. Rosenzweig, because the rest of the witnesses would relate to these particular acts.

THE COURT: Dr. Rosenzweig will otherwise be your last [689] witness?

MR. HUSK: Yes.

(Counsel confer off the record.)

MR. HUSK: Your Honor, one of the other factors, is there is a statement from Mr. Hadley, as the Court will recall that was the subject of the motion to suppress.

And, that statement would obviously be offered at some point in time. But that statement dealt with Cory Kay. And so that is another factor that would have to be considered. I think there was a complete denial as to the other counts, but he—there was I guess arguably a concession regarding Cory Kay.

THE COURT: I think I said that the statement, I ruled before that the statement wasn't voluntarily made. And I don't believe I ruled that it was going to be admissible at the time of trial.

And I don't think that that statement, in the context of these counts would be admissible, except insofar as it might then come up by rebuttal or something else, depending upon what might occur insofar as Mr. Hadley's nature, activities, propensities would be concerned.

MR. TREBON: Your Honor, that brings up another issue and maybe I should address it with the Court now, because I happened to be reading an evidence book last night and saw it.

Even if this Court determines that acts involving Cory [690] Kay would be admissible under 404(b), there is a different standard, and in this case I believe a far tougher one, as to whether or not—in fact, I think it is a matter of evidence, it is simply not admissible to cross-examine Mr. Hadley about it under 608.

In other words, it's not anything that resulted in a conviction, therefore I don't believe that Mr. Hadley could be cross-examined by the Government about the prior bad act involving Cory Kay.

THE COURT: I'm not getting into Mr. Hadley and whether he is testifying, because obviously he's not going

to testify in the Government's case. And all I'm interested in now is the Government's case. I will certainly consider that over the weekend.

MR. TREBON: It is something that I will try to brief over this weekend. And if the Court is willing, would ask for some kind of a ruling to guide me, before I put Mr. Hadley on, if we come to that point.

But it's a very—you know, it is an interesting evidence question that I thought the Court might want to be aware of.

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[879] MR. HUSK: And do I understand the Court's ruling with regards to cross-examination of Cory Kay that at this time he can only be cross-examined as to any prior conduct with the defendant and not anyone else?

THE COURT: Well, let me say this, I don't know that I have said that. I will—we will take a few minutes and I will read this amendment to Mr. Kay and if we don't admit it now in the Government's case-in-chief, of course, there is always—then it could be considered further in connection with any evidence presented by Mr. Trebon.

MR. HUSK: Okay.

MR. TREBON: Your Honor, I just want to comment on the [880] offer to stipulate. The offer to stipulate doesn't need to read that if these things happened such and such. We are willing to stipulate that any of the acts that are alleged in the indictment, to the extent that they occurred, obviously I don't want to have a stipulation that we admit that they occurred, but to the extent that they occurred, that they occurred, because of the intent required by the statute and for purposes of sexual gratification. We are willing to stipulate to that.

And, other than propensity I can't see the relevant purposes of admitting the stuff at this point. The intent statute is going to be satisfied. It is really the kind of acts that in and of themselves raise the inference of intent anyway.

You don't touch someone else's penis for some other purpose, unless you are a doctor, than sexual gratification, but to the extent that that is not inferred from the act itself, we are willing to stipulate that that would be the requisite intent, satisfied by the evidence in this case.

And for that reason I believe that the prior bad acts evidence is simply irrelevant and ill advised, in light of the overwhelming amount of prejudice that it is going to cause.

And I do think that it is a trendy area in the law. The Second Circuit is now—clearly allows the defense to

take the issue of intent out of the case, if they are willing [881] to so stipulate.

The Ninth Circuit, in the McCoy case notes the Second Circuit's position in the footnote. Doesn't resolve it in the McCoy case at all. A couple of other cases that are cited on page six in my memo are cases in other circuits now too that are starting to discuss that issue and give it some credence from the Second Circuit as well, so I believe it is the fairest way to deal with the issue.

And if it hasn't come in the Ninth Circuit, I think that it will. It is the fairest way for this Court in this case to deal with the issue, to allow us to make that admission and move on the case without causing any further prejudice.

Certainly the Government can't be hurt if the intent condition of the statute is met by our admission. I don't know how that could hurt them. There has already been three acts before the Court, essentially they have had prior bad act evidence, because there is three different victims in several different counts already before the Court. That ought to be enough. They ought to have to prove the acts occurred that are charged in the indictment at some point without ruling on propensity.

We are willing to stipulate on intent and I think that should be enough.

THE COURT: Well, I will look at McCoy and several of [882] these other cases.

As I say I, at this stage at least in this Circuit, I suppose I can try and judge what the circuit will do and I can also judge at some time what I think the Supreme Court will do.

All right. So, how are we doing on our jury?

THE CLERK: Half of them are here.

THE COURT: Half of them are here.

All right. Well, let me say one other thing also with respect to Mr. Kay. We were perhaps in a more informal mode Friday afternoon. I think you should advise Mr. Kay that he should answer questions directly and not volunteer any comments or quips with respect to activities or "If you really want to know, ask Mr. Hadley," or something like that, that we had during the trial—or during the Friday afternoon session. Okay?

MR. HUSK: Certainly.

MR. TREBON: Thank you, Judge.

(Whereupon a recess was taken.)

THE COURT: All right. Just a couple more things before we have the jury in. Although I noted it on Friday, specifically, I have given consideration to the purposes of Rule 404(b), and also Rule 403.

With respect to 404(b), the evidence with respect to prior bad acts involving, in this instance, Mr. Kay are [883] relevant, the evidence goes to the motive and intent of Mr. Hadley, as well as whether there were any particular plans or preparations having to do with his conduct in these kind of activities and whether that, in this instance or these instances before the jury, were similar to those on other occasions.

And it seems to me as well that that is the reason why the stipulation proposed by Mr. Trebon wouldn't be reasonable or appropriate under all of the relevant circumstances in this case.

The evidence having to do with prior bad acts, how they were allegedly undertaken and carried out, the probative value of that evidence outweighs any unfair prejudice to the defendant. There is a similarity of the acts. The considerations reflected in Huddleston, that evidence could also be considered as corroborative of the testimony of other witnesses.

So for all those reasons I have concluded to admit the evidence of prior bad acts related to Mr. Kay.

The stipulations proposed by Mr. Husk—or by Mr. Trebon, pardon me, do not unequivocally, in this instance, remove any intent or the other relevant factors under Rule 404(b).

With respect to—we have discussed aspects of Mr. Kay's sexual activities with other people by way of [884] cross-examination, more particularly with respect to Mr.

Trebon's suggestion, at least, that he had had witnesses from the Navajo Tribal police agency having to do with their opinions about the charges, or allegations that had been made by Mr. Kay.

I have already ruled that any of that evidence would first be argued before the Court, before it is presented in open court before the jury and brought up in that fashion.

I would think however that to the extent that Mr. Trebon might conclude to get into such an area, that he could bring out if he desired to, through Mr. Kay that Mr. Kay may have made charges against Mr. Hadley or others, for that matter, I suppose, and had then withdrawn them, and the Government could then, to the extent that Mr. Trebon didn't, go into why those charges might have been withdrawn.

Now, that brings us to the other point that I didn't discuss, having to do with a possible limiting instruction.

What is your thought on that, Mr. Trebon?

MR. TREBON: Your Honor, if I may first briefly comment on a couple of things that were raised by the Court. I don't know how the stipulation doesn't unequivocally admit intent, but we would be willing to change it so that it does so to the Court's satisfaction, if that is a problem.

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[1338] [VERL HADLEY]: Most of the students I knew in Kayenta were high school students.

Q. MR. HUSK: I understand that, but that wasn't my question. My question said between the ages of 10 and 15, have you ever provided rides to those students where you just went cruising around Kayenta in your car?

A. I don't believe, no.

Q. So if there were students within that age group that said that they had—

MR. TREBON: Objection, Your Honor, may we approach the bench?

THE COURT: Certainly.

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I object because these questions are irrelevant, number one. Number two, there has been no testimony from anyone in Mr. Husk's case or during our case that there are rides provided to students at the school and if he is trying to set up impeachment on a collateral matter, I object to that, because those would be other bad acts that he's never sought in his motion to introduce and weren't introduced yet, so far. I object if they are introduced, if they come later, but to ask Mr. Hadley about them now to—it's collateral, I think they are irrelevant to ask Mr. Hadley now.

[1339] THE COURT: I don't understand that line of reason.

MR. TREBON: There has been no testimony from any of the witnesses.

THE COURT: Why would there have to be? He can ask this man first, can't he?

MR. TREBON: To get a denial simply so he can—no, I don't think he is allowed to ask this witness matters that have nothing to do with this case, just so he can bring in witnesses at a later time to try to impeach him on a collateral matter.

THE COURT: Whether it would be collateral or not, seems to me it has relevance and he is entitled to cross-examine him about matters that are relevant to all of these discussions that we have been having and he brought out incidents involving that. You brought up the Thriftway Store. I think also every time he answers a question "I don't believe so," Mr. Husk is entitled to pursue him. That is not an answer. And he did that repeatedly with you.

MR. TREBON: His answers—his question is vague as well.

THE COURT: Well, in your questions he said innumerable times "I don't believe so."

MR. TREBON: Well, we are here on his objection—my objection to his question now.

THE COURT: Your objection is overruled.

[1340] MR. TREBON: The question is vague about whether or not—what time is he referring to?

THE COURT: Find out whether this was this age, that age, or whatever.

MR. HUSK: Certainly.

THE COURT: All right, let's proceed on.

(End discussion at bench.)

Q. BY MR HUSK: I believe you testified that you have not ever provided rides to children from the Thriftway Store around Kayenta within the age group from say 10 to 15 years of age. Was that your testimony?

MR. TREBON: Your Honor, I object to foundation as to when this incident took place.

THE COURT: This is ever and then we can—

MR. HUSK: I will narrow it down.

THE COURT: Then we will pursue it further.

THE WITNESS: I might have on certain occasions, dropping them off at their home or something of that nature.

Q. BY MR. HUSK: Okay. So earlier when you said that you did not, that was not accurate; is that correct?

MR. TREBON: Objection, Your Honor, asked and answered.

THE COURT: His answer before was "I don't believe so," so let's proceed on.

Q. BY MR. HUSK: Have you ever had any of your current students over to your home?

[1341] MR. TREBON: Objection, Your Honor, as to particular persons involved.

THE COURT: Well, rephrase the question, because we are going to get into quote "current students" and we know he is not teaching.

Q. BY MR. HUSK: Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as a guest?

MR. TREBON: Object as to relevance.

MR. HUSK: It's irrelevant?

THE COURT: Well, now, both of you. Now I'm the one that makes the rulings. The objection is overruled.

MR. HUSK: Thank you, Your Honor.

Q. BY MR. HUSK: Did you understand my question?

A. Repeat it, please.

Q. Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as guests?

A. Well, my nephews are in that age range, yes, they would come over.

Q. Have you ever had Amadee Roy over to your house?

A. No.

Q. He's never been to your house?

A. No.

Q. Have you ever had any people, other than relatives within that age group over to your home?

[1342] A. No, I don't believe so, no.

Q. Have you ever provided alcohol to any minor students at your home?

MR. TREBON: Objection, Your Honor.

THE COURT: Overruled.

MR. TREBON: My objection is relevancy grounds.

THE WITNESS: I confine my use of alcohol to those persons who are 18 or over.

Q. BY MR. HUSK: That wasn't my question.

Have you ever provided alcohol to students that are minors under 18 years of age—under 21 years of age?

A. No, I don't believe so, not in my home.

Q. Have you done it anyplace else?

A. No.

Q. Isn't it true, Mr. Hadley, that you have a reputation for touching some of the male students in your classes?

MR. TREBON: Objection, Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I think the record should show my strongest objection to all of these matters. This is a character assassination. If he's going to prove him guilty of something that is supposed to be the charges in the case, not did you do this or that, no.

THE COURT: Do you think, Mr. Trebon, he's confined to [1343] asking him whether he had sex with X? I don't think so. I think he is entitled to go into all these matters, particularly in view of your examination and his answers that would paint himself as something who doesn't do any of these things and hasn't done any of these things and they are all relevant insofar as his activities are concerned with these students and whatever.

MR. TREBON: And especially the reputation thing. That is strictly character, strictly forbidden by 404. He can't ask him—

MR. HUSK: He puts his character in issue when he takes the stand.

MR. TREBON: For truth and veracity alone.

THE COURT: I think any character trait is irrelevant, but in any event—

MR. HUSK: My particular angle, Judge, is he brought out through his witnesses that this man never touches any students, people.

MR. TREBON: I have?

MR. HUSK: You had witness from the school that said they never saw that.

THE COURT: Are you going to have somebody say that that is his reputation?

MR. HUSK: Yes, I am.

THE COURT: I will overrule the objection.

[1344] MR. TREBON: Let the record show not only my objection, I believe that it violates the rule on character and I believe that it turns the case into a character assassination case. In the event the stuff comes in, I move for a mistrial. And I would like the record to show a continuing objection.

THE COURT: You make objections as you consider it appropriate, but I would do it less obstreperously. It looks like you are going down for the 9th count, so just object and if you want a side bar, come up. We are not in final argument yet, so save it for those times.

MR. TREBON: All right.

(End discussion at bench.)

Q. BY MR. HUSK: Isn't it true, Mr. Hadley, that you have a reputation for touching the male students in your classes?

A. Could you define touching, please?

Q. Sure. Isn't it true that you have a reputation for tickling male students in the chest area?

A. I believe in a playful manner, or if I am instructing in a classroom.

Q. Mr. Hadley, I asked the question, if you would just restrict yourself to answering that question.

A. In a playful manner.

Q. And isn't it true that you also have tickled students in the back area?

MR. TREBON: Your Honor, I object on relevancy grounds. [1345] I would like the record to show a continuing objection, so that I don't have to object to each question.

THE COURT: Well, with respect to touching in the back you can have a continuing objection. Anything else we will discuss as we go along. The objection is overruled.

Q. BY MR. HUSK: You also tickle—have a reputation for tickling students in the back area; isn't that true?

A. In a playful manner.

Q. Isn't it also true that you have a reputation for tickling students in the thigh area?

MR. TREBON: Same objection.

THE COURT: Same ruling.

THE WITNESS: In a playful manner.

Q. BY MR. HUSK: Do you think it is appropriate behavior for a teacher to tickle his or her students even in a playful manner?

MR. TREBON: Objection, irrelevant and argumentative.

THE COURT: Overruled.

THE WITNESS: Certainly not in the classroom. However, outside on the playground where there is a less restricted area, I think it is appropriate.

Q. BY MR. HUSK: Mr. Hadley, you testified that you were the acting principal for a period of time; isn't that true?

A. Yes, I did.

* * * *

[1353] Q. Did you allow any other students to drive your vehicle?

A. No.

Q. You never allowed any minor students to drive your vehicle, any minors, any people that did not have a license?

A. No.

MR. HUSK: Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. HUSK: Your Honor, I have here a list of citations received by the defendant. One on 5-19-1976 in which he was cited for allowing an unauthorized person to drive his vehicle. The Government is prepared to present the witness—the testimony of the Department of Public Safety officer, who [1354] provided that citation, who will indicate that the person driving that vehicle was a minor and that he was so cited. I would ask at this point in time the opportunity to impeach the witness regarding that, based on his assertion.

MR. TREBON: Your Honor, number one, he needs to have a certified copy of a conviction.

MR. HUSK: Not for impeachment. I can ask him.

MR. TREBON: You can ask him if he was convicted, but he has to stand by the answer. I don't think you have to show the piece of paper.

MR. HUSK: I am prepared to do that, or certainly allow—or to rely on the officer coming in to testify later on.

MR. TREBON: That doesn't indicate it is a minor person, so I would object to him showing him that particular document.

MR. HUSK: I can ask him the question, I believe, Your Honor.

THE COURT: Well—

MR. TREBON: I also think that this again is a collateral issue, that under 403 is confusing to the jury, they are not particularly pertinent to any issue in the case.

THE COURT: Was he in the car or any of those kind of things?

MR. HUSK: Yes, he was.

[1355] THE COURT: On that occasion?

MR. HUSK: Yes, he was.

THE COURT: Well, since it's in the nature of the same kind of acts, so forth, I think it may have some relevance, so I will overrule that objection. But you avow, Mr. Husk, that you have a witness who will come now and with the records and be able to establish that, when it happened, and that that—and the details of it by certified copy of the police records?

MR. HUSK: I'm not sure I have certified copies of the police records, but I have a copy of the citation. The officer can recall distinctly Mr. Hadley. He will be able to identify Mr. Hadley, will be able to indicate he gave him the citation on that date, and describe the circumstances under which it was issued.

MR. TREBON: I don't believe that that is probative. You are not allowed to bring in extrinsic evidence for impeachment.

THE COURT: I think for the defendant it may be true—or for a general witness. I think I have allowed it here. But where you get somebody that is even a percipient witness, important witness, I think you can bring in extrinsic evidence. You know, it is—it happens regularly, for instance, where there is a government informant, they impeach them on everything from the kitchen to the sink.

MR. TREBON: Your Honor, unless he's got a conviction [1356] document, certified copy of a conviction, then I would object to having a DPS officer coming to testify about the fact of the case.

THE COURT: The DPS officer can testify that he stopped him, what he saw, what he observed, so forth, so I will overrule the objection. All right.

(End discussion at bench.)

Q. BY MR. HUSK: Mr. Hadley, isn't it true that on May 19th of 1976, in the Monument Valley area, you

were stopped by an Arizona Department of Public Safety officer and cited for allowing an unauthorized person to drive a vehicle and that person was in fact a minor; isn't that true?

A. That's true. I understood the question—I understood the question previously that I thought you were making a reference to my students at Chilchinbeto Day School.

Q. Who was that person that you were allowing to drive the vehicle?

A. I believe the kid's last name was Vanarsdale or something like that. Vanarsdale or something. It's been some time I don't remember his first name.

Q. Was he a relative?

A. No.

Q. Had he been asking to drive your vehicle?

A. Excuse me?

Q. Had he asked you to drive your vehicle?

* * * *

[1397] THE COURT: No. Laverl, L-a-v-e-r-l. That's not correct?

MR. HADLEY: That's not correct.

THE COURT: Bridget said he said "Ah, Verl." I have to erase my credit. All right.

MR. HUSK: Your Honor, the reason why the Government requested this opportunity to discuss this outside the presence of the Court—or outside the presence of the jury, not the Court, is that the Government has various witnesses, who are minors, who are former students of the Chilchinbeto School, who would come in and testify to the fact that: One, they have either seen the defendant touch other students; two, to have been touched by the defendant themselves; and three, can attest to—and I guess I should define "touch." Touch being everything from tickling to squeezing the thighs to attempting to touch the genital area over the clothing.

The Government further has a couple of witnesses that will testify regarding the fact that they too have been

at defendant's residence in Baby Rocks and that while there, the defendant showed video movies and was involved in rubbing the back and the neck area of these minors.

I think those are the first issues I would like to take up with the Court. There is one other matter as well.

But it is the Government's contention, Your Honor, that based upon the defense testimony and the testimony that has [1398] been elicited during the defense's case regarding the fact that the defendant has never been seen touching students, that this information is relevant and under 404(b) is admissible to show common plan and scheme, motive, preparation and intent.

MR. TREBON: From the outset of this case we have consistently stated that intent was not an issue. Our defense in this case, I believe the record will show, has consistently been that the acts did not take place.

I asked Mr. Hadley point blank with respect to all of the students that were involved in this case in terms of the indictment, whether or not he touched them on those particular occasions. He said that he did not.

He never said that he touched them, but that he wasn't intending to touch them in a sexual way. Never said that he pulled down their pants, but he didn't mean not to insert his penis. Nothing like that was ever said.

THE COURT: But the jury—we have gone through that point, at least, Mr. Trebon, and the law is not so unsophisticated, that someone can deny doing an act and not have evidence presented with respect to a plan, or circumstances of doing those acts and what the purposes of those would be.

And so if he touched other people and then did other things, it has to do with the intent with which he touched these people, if they find he touched them. And I'm not going [1399] to go through that exercise again.

MR. TREBON: The—

THE COURT: I'm not saying this evidence is admissible now, either, but I am simply saying that argument just doesn't wash as far as I am concerned in a case such as this.

MR. TREBON: The other point I want to make, the reason I pointed it out again now, Judge, is that it is no longer a matter of what we propose to do. I think it is a matter of what we have done on the record.

Second of all the Court has already allowed—there are three counts that have been tried together, three counts of a similar nature that were tried together, so the jury already has three acts of touching. If they decide that the touching takes place, I don't believe it's going to be hard for them to conclude what kind of touching this might have been, if the touching in fact occurred.

I think the critical question and the only real question, based upon this record, is whether or not the touching occurred with respect to these three individuals.

If the Court allows other bad act evidence, the problem is, it tends to show propensity more and more. Doesn't show whether or not these particular incidents took place. There is no real contention, I don't believe after Cory Kay's testimony and after all three of these people being tried together, You know, what the intent is. I don't think it's [1400] become more of an issue as we put on the case, so the Court should allow more prior bad act evidence in.

In fact Mr. Hadley testified that yes he often does tickle the children.

THE COURT: I guess all of these cases, as we say, they don't necessarily be consistent, you put on enumerable witnesses that apparently never saw him doing any of those things so,

MR. TREBON: I never asked any of those witnesses whether or not Mr.—they believed that Mr. Hadley's character was such that he wouldn't do these things.

THE COURT: No. You asked them did he touch anybody and they never saw him.

MR. TREBON: Right. With respect to individual witnesses. I never put on any character evidence in this case.

THE COURT: I can understand that.

MR. TREBON: Your Honor, the other thing that—I just think that there has to come an end, hopefully, under 403 analysis as to just how much the Court is going to allow. Three acts tried together and a prior bad act involving sodomy in a case of this kind is enough, I believe, for the jury to consider.

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[1404] MR. HUSK: Your Honor, the other issue is a much more serious issue, and I call that to both the Court's attention as well Mr. Trebon's attention.

Last night the Government was contacted by the FBI in Cortez, Colorado and they indicated that a person there by the name of Kyle Hartman, based upon a lead that had been sent out some time ago was available, was interviewed and indicated—first of all Mr. Hartman is now, I believe, 20, in his mid-20's. And he indicated that he, while he was a fifth grade student at Chilchinbeto High School had been sodomized by the defendant, Verl Hadley.

The Government did not have that information until just [1405] last night. We have requested that Mr. Hartman be brought here. He's on his way here and based upon secondhand information, although I do not feel comfortable providing a lot of detail at this time to the Court, but it is our understanding that a lot of the similar procedures that have come out in this case, in our case-in-chief, were utilized with regards to Mr. Hartman.

And again I call that to the Court's attention and as soon as I have more details I will be happy to provide those to the Court and I should have those later this afternoon.

THE COURT: Not only to me. I don't know that I'm necessarily the one that that needs to be directed to now. I would think more to Mr. Trebon, and discuss those matters with him and I would think, based on the circumstances, it would be appropriate, if Mr. Trebon requests, for him to interview the person.

MR. HUSK: Absolutely.

THE COURT: And then we would be in a position to discuss it in some meaningful way.

MR. TREBON: Your Honor, I have the same problem with this. Is the Court indicating that after it's allowed already one prior bad act as to sodomy that it would allow another one in this case?

THE COURT: All depends on what it is and what the circumstances were.

[1406] MR. TREBON: Of course, he's now in his 20's and he was in the fifth grade, we are referring to something that is well over 10 years ago.

THE COURT: Well, I don't know. Until I know more about it I'm not making any rulings now. All I am telling Mr. Husk is he can talk to the person. He can talk to you about the person. You can interview him if you want to, and then before we bring the person in before the jury we will discuss it further and in some specific detail.

MR. TREBON: Of course, this is something we have to investigate as well. I mean that could be the subject of a whole case. I would be very fearful of pretending that I could interview this person and be prepared to cross-examine.

THE COURT: You can tell me or explain to me why that might be so and what investigation would be needed and et cetera.

MR. TREBON: All right.

THE COURT: I am just hearing about it now like you are.

MR. TREBON: I know, Your Honor. The other thing, of course, I know the Court is aware of it, but just to verbalize it is that this case has been pending for a long time, they superseded once already.

THE COURT: Well, it hasn't been pending a long time, because of my problems.

[1407] MR. TREBON: I know, Your Honor. I'm certainly not saying that, because of my mine, no doubt, we needed a lot of time to investigate this case. I am

very pleased that the Court gave us this time and I think it is evident and if it is not, we did a lot of investigation, we worked hard on the case. It was not a case that was easy to investigate. It took a lot of trips to even find a person sometimes.

The Government has had equally that amount of time or more to investigate the case and it shouldn't come down to the last wire with major breakthroughs like this in terms of new witnesses, new acts, that would be unfair to everyone, including the Government, who hasn't had—who is caught in the throes of advocacy as we both are before the Court at this time, to put on evidence that hurriedly without greater inspection.

THE COURT: Well, if it appears that it is necessary and greater time is necessary, then I would entertain a delay for those purposes as well. All I am saying is, I don't know anything about it. Mr. Husk seems not to have talked to the individual. The person is arriving this evening?

MR. HUSK: Yes, it is my understanding, he should be here approximately 4:00 o'clock.

THE COURT: Then we can take it up, but we are going to take it up out of the presence of the jury.

MR. TREBON: The other thing that I feel I should [1408] mention is not just a matter of whether or not a delay would allow us further investigation.

Based upon Mr. Husk's motion, based upon the hearing the Court held out of the presence of the jury last week, we put on a defense knowing what the Government's case was supposed to be. At some point you have to be able to plan your defense and base it upon a fair chance to review the facts before trial and before you put on evidence, and not in the middle of it, and that would be impossible now with respect to—

THE COURT: I don't know whether it would or wouldn't until we find out more about it. You discuss it with your client, et cetera. I don't know. I would—and then I will hear all of those matters.

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

TRIAL PROCEEDINGS

* * * *

[1428] THE COURT: Well, let me ask, those names, have they previously been disclosed to Mr. Trebon.

MR. HUSK: Yes, they have.

THE COURT: Well when?

MR. HUSK: The witnesses at the beginning of trial, Your Honor.

THE COURT: But specifically several months before trial or when these other folks have been identified, they were not identified to the extent of any demands by Mr. Husk or the bill of particulars, or anything like that?

MR. HUSK: No, Your Honor, because they were not contained in the indictment and the Government did not think—

THE COURT: You had a motion for prior bad act evidence?

MR. HUSK: Right. They were not contained in that motion and that was primarily because the Government was not certain that it would be relevant unless the defendant took the stand and made the denials, which he in fact did make.

And, it was at that point that the Government contends [1429] they become not only relevant, but crucial to the Government's case.

THE COURT: Well, those matters were known—have been known to the Government then for some period of time, those two people?

MR. HUSK: Yes, Your Honor.

THE COURT: All right. Well, it's five minutes of 9:00. We asked the jury—they are here at 9:00.

I think maybe what I will do is just do a little studying until 9:30 and then we can see what we want to do and if we want to take some time to talk with Mr. Hartman, and also, Bridget, if you would type up just that several questions that I mentioned, which was shortly—it was after 11:40, so that it will be right around lunch time, according to my notes. All right.

And if you would then tell the jury that I am—that we have some matters that I have to consider and therefore that they are at liberty until 9:30. We will just walk over there. Okay?

(Whereupon a recess was taken.)

THE COURT: Refresh my recollection about some of our pretrial matters.

The Government gave a notice, as I recall, under Rule 12, that it was going to use certain specific evidence along these lines; is that correct?

[1430] MR. HUSK: That's correct, Your Honor.

THE COURT: And, was there ever any motions made under Rule 12, however it is, 12(d)(2) or (3) with respect to the defendant, Mr. Trebon?

MR. TREBON: I'm not sure what the Court's question is.

THE COURT: Well, look at—do you have the criminal rules there?

MR. TREBON: Yes, Your Honor.

THE COURT: Yeah.

MR. TREBON: With respect to an alibi defense?

THE COURT: No. It is before that. Look at Rule 12 before that, it is confusing.

MR. TREBON: Oh, I'm sorry. 12(2)?

THE COURT: No. Just look at Rule 12.

MR. TREBON: All right.

THE COURT: And then paragraph (d).

MR. TREBON: (d).

THE COURT: And then (2), "At the request of the defendant."

MR. TREBON: Yes, Your Honor. I did send a discovery letter requesting exactly the materials listed in the rules set by the Court, which was Rule 12(d)(2), that was a letter to Mr. Husk on February 21 of 1989.

And I believe it was sometime around then that Mr. Husk filed the 404(b) motion, although I don't remember the exact [1431] date of that now. If I can find it. The motion in limine filed by the Government was actually earlier, but that was filed on November 7th of '88.

THE COURT: Well, my understanding, perhaps I am wrong, apart from Rule 16 and Rule 12, to the extent that the Government gives notice of an intention to use certain evidence, Rule 404—Rule 404 does not require the Government to give any notice of an intention to use this kind of evidence, does it?

MR. TREBON: I don't—it is a question I haven't looked at, Your Honor. I know that the Government did give such an intention in this case.

THE COURT: Well, and I think in a sense these kind of issues that we are talking about here are somewhat different again, because the Government's knowledge of this evidence with respect to this gentleman, seemingly, at least, by Mr. Husk's statements came to light just recently during the course of the trial.

You have also had—the court reporter gave you, I take it, Mr. Trebon, a copy of seemingly the questions that I had in mind?

MR. TREBON: Yes, Your Honor.

THE COURT: Anything further on your part, Mr. Husk?

MR. HUSK: Your Honor, I just wanted to add that the Government did comply with Rule 12(d)(2) in that notice was [1432] provided as to those acts which the Government intended to use in its case-in-chief as cited by the rule, not that—the rule does not require any notice for rebuttal, in view of the fact that obviously a lot of that cannot be determined.

The notice was provided, although it certainly did not have to be provided, and any notice for rebuttal purposes is clearly not required.

THE COURT: Well, and I would propose at some time to take the testimony, or have the witness testify, so that we will know something more about what he's going to say. And, in that respect, perhaps to even defer the taking of his testimony, if it is going to be taken, until Tuesday.

MR. HUSK: That would be acceptable. I think for our purposes, Your Honor, perhaps if we could, at least if the Court could hear that testimony today just for the purposes of working through the weekend and seeing exactly what we are talking about. I think it would be beneficial, not only to the Court, but I'm sure to defense counsel and to the Government as well.

THE COURT: And then we can consider anything further that Mr. Trebon might want to proffer about that. I think in view of the specific assertive denials, emphasized denials of Mr. Hadley, about these kind of matters, that the testimony of this witness, if nothing else, would relate to impeachment or possible impeachment of Mr. Hadley insofar as he appeared as a [1433] witness or did appear as a witness and specific denials with comments such as this.

What I would like to do is proceed with the other evidence that we have, excuse the jury when we have everything else except this issue and then come back Tuesday morning.

MR. HUSK: Your Honor, in regards to the Court's comments too, I would add and call the Court and counsel's attention to U.S. versus Stockton 788 F.2d 210, cert. was denied in 107 Supreme Court 147.

And in that, it—Stockton, in a footnote, discusses extensively Rule 404(b) not being—the other purposes listed in Rule 404(b), not being exhausted and included in those other purposes is a purpose for impeachment and there is case law to that effect cited in that particular case.

THE COURT: Without agreeing to whatever conclusion I may come to, Mr. Trebon, is there any objection then to, this morning, then you are proceeding with the other—are the other witnesses available, the ones from California?

MR. HUSK: Yes, sir—oh, I don't know.

MR. TREBON: Arnold Charley is supposed to be here this morning. I don't know where he stayed last night. We haven't seen him this morning.

We do have one other witness that is here this morning that I would like to call, that would be Sergeant Laughter, to get in the statement that Mr. Hadley made to him in 1985.

[1434] I could put him on as surrebuttal as well, I did have one another witness in surrebuttal that I would be offering and that would be someone—it is in anticipation that Mr. Schafer will be called. And it was someone else who was a participant in a conversation with Mr. Schafer, but—and could put Laughter on surrebuttal too, that would be fine with me.

MR. HUSK: I have no objection to him going with Mr. Laughter at this point, I think it is a very quick witness.

THE COURT: Let's do that. Let's find out where these other people are and get them in and testify this morning. You have your investigator, let's get them down here and have them testify. And then, have the Government's other witnesses and then we could resolve—

MR. TREBON: Sure.

THE COURT: —or discuss this issue further, or give you whatever opportunities you want to take over the weekend with respect to it.

But, given the testimony of Mr. Hadley and his affirmative denials, that certainly puts a different light on this evidence.

MR. TREBON: Well, Your Honor, unless the Court has got a different transcript from the court reporter

than I did, we didn't ask him whether or not he had ever had sex with any other minors.

[1435] THE COURT: I understand that now, reading that.

MR. TREBON: I just want to quickly point out, maybe you don't want me to address this issue until next week, but under 608(b), specific instances of conduct, extrinsic proof of those is not required as impeachment matters.

THE COURT: We can discuss that further. I take a different view with respect to percipient witnesses and with respect to a defendant who testifies.

All right. Mr. Laughter ready to come in and testify?

MR. TREBON: Yes, Your Honor.

MR. HUSK: Your Honor, with regards to the two minor students that I identified to the Court, they are here today and I had anticipated putting them on. I don't know if the Court wants to take a recess prior to me doing that.

THE COURT: My inclination is not to allow them to testify, simply for a number of reasons, including all of the time that it's going to take and undoubtedly the same kind of back and forth business that we had earlier. And I think those witnesses were known to the Government earlier and could have been called earlier.

MR. HUSK: Fine.

THE COURT: So we will get the jury in and start them off an hour late.

MR. TREBON: Unless that child shows up, Your Honor, this is the only witness I have.

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[1626] All right. I was in the midst of reading a couple of cases that Mr. Husk provided. Did you give copies of those opinions or the citations to Mr. Trebon?

MR. HUSK: I did not directly, Your Honor.

THE COURT: If not, why don't you give them this, we will give you the copies, or make copies. Let me make a note of the cite and then we will give those copies to Mr. Trebon.

All right. Well then, we can discuss this and hear arguments, a little, in about 15 or 20 minutes perhaps, if that is convenient. I wanted to read those cases.

Also, it would seem to me that assuming the evidence is admitted, it would be admissible for two purposes, one to impeach Mr. Hadley with respect to his statements that he had not done these things with other people, minors.

And secondly insofar as the intent, motive, plan, et cetera, is concerned, so if the evidence is going to be admitted, then we can discuss whether the limiting instruction should be given again and whether anything should be said about the impeachment issue, or simply leave that for counsel to cover in argument.

Also, we have handed out the instructions and at some time after the evidence is over, when we have a recess, why we can also review those matters and discuss them and take up any issues related to that as well.

So, if it's—why don't we—the jury is coming in at [1627] 10:00, why don't we get together perhaps at 20 minutes of 10:00 and we can hear any arguments or have other discussions about this particular witness. Is that all right?

MR. HUSK: Fine. Thank you, Your Honor.

THE COURT: All right, thank you.

(Whereupon a recess was taken.)

THE COURT: Mr. Husk, all right.

MR. HUSK: May I proceed, Your Honor?

THE COURT: All right.

MR. HUSK: Your Honor, it is the Government's contention that the testimony of Kyle Hartman is admissible for two purposes.

One of those is under 404(b), and that is to show plan, motive and intent on the part of the defendant. And the other one is for the purposes of impeachment of the defendant's own testimony and that of various witnesses that the defense has presented.

If I may address the issue of 404(b) preliminarily, Your Honor. It is clear that the acts which Mr. Hartman testifies to, basically sodomy, are the same acts that are relevant, at least in the instances involving Amadee Roy.

As the Court has heard from various witnesses, including Dr. Bendheim, that type of sexual activity and that type of sexual preference is very unique and therefore we are talking about a very unique type of conduct and I think that [1628] is particularly important in this type of consideration.

We are however, Your Honor, dealing with an incident that occurred approximately 17 years ago. The furthest one being 17 years ago and occurring over a period of time for about five years, according to the testimony that the Court has received.

First of all, I think it is important to note that there are no absolute time requirements set forth in Rule 404(b), rather the Court's acknowledge that there is a reasonableness standard that each trial Court is to apply in determining the admissibility of those type of acts.

Setting that aside, there are cases, I would cite the Court to U.S. v. Cuch, C-u-c-h, 842 F.2d 1173, in which an act seven and a half years prior to a similar modem of operation was admitted.

Also, U.S. versus McCullom, a Ninth Circuit case, 732 F.2d 1419. And a case in which certiorari was denied in 469 U.S. 920, 105 Supreme Court 301. And in that case, a 12 year old conviction was admitted under 404(b) purposes, as well. Actually it was admitted under 609, but the court said that the act even though it exceeded 10 years under 609 was admissible under 404(b), regardless and therefore there was no error in that particular instance.

Finally, the Government would call the Court's attention to U.S. versus Engleman, and that is at 648 F.2d [1629] at page 479, in which prior crime 13 years prior to the charged offense was also admitted.

There is also, Your Honor, an abundance of case law that makes it very clear that in these type of instances if there is a gap in time, for instance, if a person is—if the act occurred 15 years prior, but the person has been in prison for 10 of those 15 years, that that basically tolls the time period.

And I think the Court has heard testimony in this particular instance that there was a period of time, as indicated by Mr. Hartman, where Mr. Hadley left and his own testimony indicated he went to the University of Arizona to work on his college degree.

He was out of the Kayenta mainstream, for all intents and purposes, outside the education field attending college. He was not at the institution—at any institution where he had immediate access to children. And I think that is another consideration that the Court should look upon favorably in admitting this type of evidence.

Finally, Your Honor, there is the concern of impeachment. As the Court is aware, matters can be admitted for impeachment. Impeachment is also one of the areas considered under 404(b). The defendant has testified that he never molested any minors. The defendant has had witnesses testify that he is not in the company of minors. Defendant [1630] himself testified that he has not allowed minors in his home, other than his nephews and friends and has never been alone with minors at his residence.

Those factors, Your Honor, clearly rebutted by the testimony of Mr. Hartman, and those factors should be brought forth to the jury. I think fairness indicates that.

The defendant has certainly raised the issue with the jury that I do not do this type of activity. And I am not—do not put myself in a position to permit this type of activity.

The testimony of Kyle Hartman goes directly to those issues and directly rebuts it and allows the jury to hear precisely the type of evidence that would directly rebut anything that the defendant has testified to at this point in the proceedings.

Finally, Your Honor, the entire defense, or a good portion of the defense in this case, has been on the issue of the FBI misconduct, interviews, suggestive interviews, intimidation tactics, some outrageous allegations on the part of the FBI.

This frenzy that Mr. Trebon talked about and this type of evidence where you have a person who has been completely removed from the community for a period of time and has come forward, outside of that community, certainy would go towards rebutting any allegations of misconduct on the part of the [1631] FBI, any suggestive interviewing techniques, any coercion, any intimidation.

And it is for those purposes, Your Honor, that the Government is requesting that the Court make the necessary finding regarding admissibility and permit the testimony of Kyle Hartman.

THE COURT: Thank you. Mr. Trebon?

MR. TREBON: As the Court is aware, we previously submitted a substantial memorandum regarding 404(b), and prior bad acts.

I would, without—and I have already argued those before the Court, they have been fully briefed before the Court. I think that going along with the Ninth Circuit and the statute and the law in the Ninth Circuit is correctly set forth in our memorandum. And I refer the Court to that substantial memorandum again.

taking the 608(b) issue first, specific instance of conduct, I believe under—I had a chance to read and have

with me a copy of Weinstein on evidence on the 608(b), specific instances of conduct are not provable by extrinsic evidence under 608(b). The probative of truthfulness or untruthfulness that may be inquired into on cross-examination.

Even then, Rule 403 analysis is required to determine whether or not they should even be allowed to be inquired upon cross-examination. Normally those involved acts of dishonesty [1632] or falsehood. In other words, the extrinsic act itself should involve dishonesty or false statement or something in and of itself that is probative of truthfulness or untruthfulness.

608(b) doesn't countenance asking the defendant various questions simply to see if he can elicit answers, so you can bring in collateral information to impeach him on those statements, when the impeachment evidence in and of itself is not probative of the truthfulness or untruthfulness.

Remoteness in time is a relevant consideration under 608(b). The time period under 609 is 10 years.

The often stated rule regarding 608(b) is that the examiner must take his answer, that the cross examiner is stuck with the answer he gets on cross-examination.

THE COURT: You think that is true with respect to the defendant?

MR. TREBON: Yes. And indeed that is what Graham on Evidence specifically states. I believe that—

THE COURT: Who on evidence?

MR. TREBON: Graham on Evidence. Handbook of Federal Evidence Second Edition by Graham at Section 608.4.

THE COURT: Read me what it says about the defendant.

MR. TREBON: It says "Extrinsic evidence with respect to the specific act or conduct of the witness is not admissible." 608(b). "The cross-examiner thus must take the answer given by the witness."

[1633] THE COURT: That doesn't talk about the defendant.

MR. TREBON: I am getting there. That is "any witness" includes the defendant.

"In spite of the text of 608(b)(1) that suggests that cross-examination of a witness, especially the criminal defendant, with respect to his prior acts and conduct not leading to a conviction is too inherently prejudicial, in light of probative value, and should rarely if ever be permitted."

And indeed Orfield, impeachment in support of witnesses in federal cases, criminal cases, 11 University of Kansas Law Review at 447, the specific pages are 460 to 464.

The general rules that federal courts—prior to enactment of 608 barred the use of prior acts to impeach at all. Under 608, again I believe that the cross-examiner is stuck with his answer. And, extrinsic evidence is not allowed merely for the purposes of impeaching a witness.

There are—there is another exception discussed in Weinstein, which is called, Evidence by Contradiction. Weinstein specifically states that that would only come about with respect to a defendant, if he, on direct examination had said I've never had sexual conduct with any other minor children. We know from examining the transcript in this case that that simply did not exist.

In fact, Weinstein goes on to say—

[1634] THE COURT: What's that now? You say in this case, I know that? Or is that what they are saying there?

MR. TREBON: In case. I'm saying in this case, we looked at the transcript and I did not ask him whether or not he ever had—

THE COURT: You didn't ask him, but the Government did.

MR. TREBON: That's right, on cross-examination.

THE COURT: Right.

MR. TREBON: And I objected to that whole line of questioning as being beyond the scope of direct. And the

rule is you can't ask a bunch of things of a defendant or any witness on cross-examination, so that you can plant a seed of bringing in other evidence. It was simply unfair in the first place and in fact, in the supplement to Weinstein on Evidence, at—

THE COURT: What page?

MR. TREBON: 608.27. If you want me to go through, there is two paragraphs that discuss this whole issue.

THE COURT: I will read it.

MR. TREBON: He talks about the fact, of course, if any evidence is allowed, it should be an essential element of the offense that it involves, it should be a material issue at trial, and moreover the defendant may have a valid objection under federal Rule 611(b) that the Government's cross-examination exceeds the scope of direct, which is [1635] exactly what one of the objections is that we raised.

And it becomes a 404(b) issue. I don't think that 608(b) is going to change the nature of the argument, that essentially is what it comes down to.

The Court has to make a 404(b) decision about this evidence, which comes back to the issues of intent and motive.

And of course, we have never raised those in the case. It is clear now, from our defense, that we have not raised the defense of intent as an issue in the case and I don't intend to argue that to the jury. I intend to argue that the later events did not take place.

And of course, that raises the issue of propensity. They will obviously tend to conclude that his prior acts tend to show that the propensity for these later acts occurring is strong. And that is why the evidence shouldn't be allowed because that is the use it is going to have.

In fact, there was—and it is discussed in Weinstein too, the Court probably has seen it, but there was a case in the Ninth Circuit that for a time decided that you could, use these other crimes evidence as impeachment and that was United States versus Batts, at 558 F. 2d

513, there was a strong dissent in that case that resulted in a Law Review article saying that the case had clearly been decided wrongly at 9 Rutgers Camden Law Review 375, a 1978 Law Review, Entitled, Federal Rules of Evidence 608(b). "We believe seized [1636] extrinsic evidence of prior bad acts of defendant is admissible for impeachment when exclusion"—

THE REPORTER: I'm sorry, John.

MR. TREBON: I'm sorry. The title is not important anyway, but there is a Law Review article on it. Later the Ninth Circuit abandoned that opinion and decided that the evidence was admissible for other purposes under Rule 404(b), namely knowledge in that particular case.

In fact, Weinstein goes on to say, at page 33, that, the restrictive purpose of 608(b) is exactly what it was intended to be. 608 was meant to limit specific instances of conduct, not to allow it. Otherwise the exceptions would swallow the rule and that was never the intent of Congress, nor the intent of the rule.

Here, as—the page that I previously told the Court about in the supplement to Weinstein, it is important to consider that there has been—that this as a prior bad act would be cumulative testimony under 404(b) and that the Court has already allowed other prior bad act evidence in this case. In fact, other prior bad act evidence of sodomy, even though that is barely involved in this case if at all.

You have to closely scrutinize the prejudicial effect. Of course, under 403, the prejudicial effect must be substantially outweighed by probative value.

And, presenting it in the—as surrebuttal, at this [1637] point, is prejudicial to the defendant as well. That is pointed out in Graham—in Weinstein's treatise as well, because a defendant getting the last say about such a major act is simply unfair. And, comes at the wrong point in the case.

The Government, we believe, does have a duty to argue these facts, bring it to the Court's attention, present it

in its case-in-chief, if it is legitimately relevant on the issue that is involved in the case.

Of course, in this case they did bring in the evidence. The Motion in Limine to present prior bad acts and we contested that and talked about it long before trial, as well as during the trial itself.

The Government has provided to the Court copies of two cases, I think both of those cases are instructive. These are the cases the Government relies upon, because the remoteness of time is obviously a factor.

I think it is fair to say without elaborating that remoteness in time goes against the Government, certainly not for it. These acts occurred a long time ago. They are less probative of the issues in this case, because of that remoteness in time, not better. But I agree that the cases generally hold that an act substantially that took place a substantial time ago may in peculiar circumstances be relevant. The question is whether or not that peculiarity [1638] exists here.

The first case—and these are copies that the Court provided to me, copies of cases the Court provided. U.S. versus Cuch, 842 F. 2d 1173, a 1988 Tenth Circuit case. This is a case in which there was an—apparently an attempted rape that occurred at the Goddess Stop Convenience Store in Utah, in an Indian reservation. Intent was the key issue in the case for trial.

The defense was that the defendant was trying to do an attempted robbery and was stopped in the act, but that he wasn't trying to rape her. The prosecution was allowed to present evidence of an act that occurred eight years earlier involving exactly the same style of offense by the defendant, which resulted in rape.

He used a rifle, he used some of the same language, he dragged the person outside of their residence into his truck and in the offense charged, he dragged the person outside of the convenience market into his truck.

The facts are very similar. And the defendant admitted on appeal that intent was the key issue. The

case says that the prior incident should be close in time, but talks over and over again about how intent was the key issue in the case.

At page 1177 "Here the defendant's prior sexual assault on Gardner is relevant and probative on the only issue at trial-intent."

[1639] "As acknowledged by the parties in the proceedings before the District Court and their oral argument on appeal, the entire thrust of the defense in this case was that the Government had failed to establish beyond a reasonable doubt the defendant's specific intent to sexually assault Borne."

They also noted that the defendant had been in prison for 30 months and that tolled the period of time involved. So actually the offense after the tolling was only six and a half years prior to the charged offense.

The second case that the Court provided me with, apparently provided by the Government, was Morgan versus Foretich, 846 F. 2d 941, another 1988 case, this time from the Fourth Circuit.

This was a case involving child sexual abuse in which one child was apparently abused by her father. They presented evidence—during child visitation. And the prosecution was ultimately allowed to present other abuse against her sister that occurred at the same time.

THE COURT: That isn't a criminal case, that is a civil case:

MR. TREBON: I'm sorry. The issue again was whether the evidence was highly relevant to disputed issues in the case, at 944. And they go on to say, "But prior acts are admitted to prove disputed issues in the case, such as the identity of the defendant," blah, blah, blah.

[1640] So in other words there, he was saying that he wasn't the person that did these. There were apparently physical injuries on the child and he said that they occurred in some accidental way.

That is exactly what we have taken out of the case. We have never said that these touchings occurred in an accidental way, we said that they didn't occur at all.

And that—945, they talk again about it being the central issues on trial that were disputed by the defendant.

Those simply are not—that simply is not the state of the evidence in this case. The arguments that Mr. Husk presented about, we are going to show that these weren't mistaken interviews by the FBI and overcome the defense, again there is no question about it, the evidence of this act supposedly committed on this person tend to overcome that defense, but that is on the basis of propensity, not the basis on 404(b) purposes, not to motive or intent.

It overcomes our case with propensity. Such the more that you present this evidence, the less credible our defense becomes, because it looks like he's been doing this for years. That's propensity argument and has a propensity effect.

Lastly, of course, not only is this evidence strong, I'm simply helpless to defend against it. I interviewed this person last night for the first time. They are acts that occurred 17 years ago, and several years thereafter, a year [1641] apart. The acts, as he described them could be off as much as a year he said. It will be impossible almost to investigate them now. But, I have had no chance to investigate them. I have no idea what this person's credibility is. I have no idea—we haven't been provided with any rap sheet on this particular person, whether or not he has a prior offense. He clearly told me he did not, but none of that information has been provided by the Government. I don't know if they have run it or not.

THE COURT: It wouldn't be a significantly part of time, but some significance, you were given the opportunity to interview this person last Friday as I recall.

MR. TREBON: Actually that is not true, Your Honor. When we left on Friday, because of other time pressures it was decided that I could interview him last night.

THE COURT: He was here on Friday, however.

MR. TREBON: Well, I didn't have a chance to interview him and didn't interview him until today.

THE COURT: I know you didn't interview him until today.

MR. TREBON: Last night, I'm sorry.

THE COURT: Last night.

MR. TREBON: I couldn't have conducted that kind of an investigation over the weekend anyway. It just would have been impossible to go up to Kayenta and possibly up to [1642] Colorado and to Phoenix or wherever we would have to go to investigate this person's credibility.

I would ask if the Court does allow it in, I would ask for a continuance of at least a month, or at least some significant period of time to investigate the facts.

But the major argument must be at this point, if we are going to have any chance of litigating fairly, the issues that took place with respect to the children involved in this case, at some point evidence of prior conduct has to stop.

There is three offenses that are being—three victims that are being tried together, three offenses against one of them. Five counts against the defendant, three different people, there has been substantial evidence of another relationship involving Cory Kay that has already been presented to the jury.

In fact as everyone said numerous times, litigation over whether or not those events took place and what they involved and so forth, including the defendant's statements and all that evidence, relate to Cory Kay, we spent much of the trial already litigating prior bad act evidence.

I am sure the Court could feel the impact of that evidence as well as I could. It's going to be extremely prejudicial. It is going to have a heck of an influence on the jury. I'm ot going to be able to do anything about testing any of its reliability. And it's going to essentially [1643] make it impossible for us to focus the issues on what occurred.

I stated repeatedly, I will say it again, that intent is not the issue in this case. I'm not going to argue intent

to the jury at the time of closing argument. I have been willing to stipulate on that matter ever since the case—ever since prior bad act evidence was discussed in this Court.

My defense may have a problem now, if this evidence is presented. But unfortunately it is after I have already presented my defense. I had to determine some kind of trial strategy before the case took place, obviously we did.

Whether or not this person was interviewed in a certain manner by the FBI is simply irrelevant to the issues on trial here. Verl Hadley could have 100 relationships with all kinds of people. And whether or not he had relationships with the people on trial is in issue, and it would be an issue in—the way that they are interviewed by the FBI would be a relevant issue in any event, but it is impossible to focus on that issue, if you present substantial evidence of prior misconduct that is going to be used by the jury for propensity.

There is many cases that recognize that these limiting instructions are not affected. I would ask a chance to—if the Court allows us to present expert testimony at a later time, that limiting instructions are not effective. I know [1644] that many psychologist and psychiatrists in the area feel that they are not followed by juries, there have been studies done with respect to that on juries, as I recall and I have not been able to do that research today, but nevertheless I believe that I could present credible evidence to the Court showing that those instructions are not followed.

This is extremely prejudicial. I can't deal with it in the time frame permitted. It shouldn't be allowed.

THE COURT: Well, again I think one of the substantial reasons that—why I'm going to admit this evidence is because the defendant took the stand and testified and, in carefully phrased questions on direct, with respect to time frames and other matters, denied that he had ever had sexual relations i.e. any intention in effect

to do those kind of things, any plan, any practice of doing those things, denied having minors in his home, denied any kind of activities similar to this.

I think also we have to—I have to consider the nature of a trial such as this and Ms. Linton can shake her head as I make any statements and that is fine with me as well, but the nature of these proceedings and the methods of proof that are available to the Government in these kind of instances is severely lacking. And it is more severely lacking when you go to an Indian Reservation and have young people, who are unsophisticated, unsophisticated with respect [1645] to the acts that are being visited upon them, arguably, but also unsophisticated with respect to the people who investigate these activities, and the questions that are asked and the phrasing of the questions and all those matters, which inevitably lead to impeachment, credibility issues.

And that has really been evident in this case as it was evident in the prior case that I tried recently, U.S. versus Todd.

There is a reluctance on the part of younger people to testify, a general unwillingness to do it, an unwillingness to come forward and be identified in these kind of activities. And as I say, the opportunities to confuse witnesses, to confuse issues, is simply overwhelming.

While the events involving this witness are remote in time, there certainly is a similarity in space and practice. These events are alleged to have occurred at Kayenta, at Baby Rocks and as we know their locations. They also involve the same kind of relationships as before, that we have had discussed here, that is, Mr. Hadley in his position as a teacher or a teacher's aid dealing with young students who are there.

The evidence is prejudicial. All evidence of any nature involving, or pointing directly to a defendant is always prejudicial. That is the purpose of the evidence that is presented, in a sense, to convict someone. Here I believe [1646] it is more highly probative than prejudicial.

Again, it is important evidence to the prosecution. It is evidence that is not, in a sense, otherwise available to them.

I will be mindful as we go through this process, to listen to the arguments of the Government, with respect to the relationship of this evidence, and that arguments regarding it should be confined to the instructions that have been given, or will be given again by the Court as to the purposes of this argument. And it is not to prove bad character or propensity.

In making those judgments, I have certainly looked particularly at the case reported at 842 Fed. 2d 1173, for these purposes.

And, we can discuss further when and immediately prior to the time the witness comes, whether to give the instruction again or what the limiting instruction is.

So that's my ruling. Now, you have a witness to call Mr. Trebon?

MR. TREBON: Yes, I do.

THE COURT: All right. That will be our first order of business.

MR. TREBON: Your Honor, I would like to add too that, I believe that there are many differences, perhaps some similarities, but many differences, between the matter involving Mr. Hartman and certainly the acts on trial.

[1647] If not even the acts of Cory Kay, but it is an act of sodomy and those aren't essentially, there is touching acts that are primarily the acts that are charged in this case, but I believe there is other differences as well.

Finally I would—the Court has made a ruling, so I don't want to argue that further.

I would ask the Court to give the limiting instruction simultaneously. I see that that instruction has been typed up, it is in the Court's proposed instructions here involving Mr. Kay and I would ask that the instruction be enlarged to include Mr. Hartman and at the time the evidence comes in as well as at the time that the Court gives its closing argument (sic).

THE COURT: I think probably we should make the instruction identity neutral really, the one that we have and I will look at that.

MR. TREBON: I would ask that the Court put in both names specifically.

THE COURT: All right.

The other thing that, while we are talking about this, and be thinking about it, and we are going to have to have a little time to discuss the instructions and also the counts and the law with respect to some of the counts. So I intend to pursue that with counsel. I think however we have to give consideration as to whether or not sexual contact is a lesser [1648] included crime with respect to the sexual acts that are identified regarding Mr. Roy.

MR. TREBON: It is an issue I haven't looked at, Your Honor.

THE COURT: I think we should, because as I say, I think that the--depending on the circumstances or how the jury perceives some of those matters, they could very well be, I believe, lesser included offenses of sexual contact.

MR. HUSK: Your Honor, with regards to what Mr. Trebon indicated on the limiting instruction, prior to the testimony. The Government has no objection to that. However, we would ask that that instruction be expanded to include the purposes of impeachment, which is clearly an issue in this case. And I don't think that the instruction by limiting it to just prior bad act, motive, intent, plan.

THE COURT: Well, I think you can argue the impeachment aspects of it yourself. You can say that Mr. Hadley testified as follows, on—when I asked him questions. And you heard this witness. And you can make your credibility assessments there.

MR. TREBON: Your Honor, a couple of other matters. First of all, I don't know if the record reveals it properly, so may I just say that I want the record to reflect our strongest objection to this evidence.

When it comes I will want to move for a mistrial, so I [1649] believe that this evidence is so strong, that if it is wrongly admitted, it does constitute prejudice so overwhelming, that a mistrial should be granted. I don't know if the Court wants me to raise that again after he testifies.

THE COURT: I don't know. If I admit the evidence, I don't know—you can certainly move for a mistrial. I have obviously considered admitting the evidence. And I can't believe that you would expect me to grant a mistrial after I have decided to admit evidence.

MR. TREBON: It is just in this age, Your Honor, I believe if I don't move for that, I may have some prejudice on appeal.

THE COURT: I don't know about that, but that is something can judge. You can certainly move.

MR. TREBON: Second of all, I did want to renew—I don't know if the Court wants me to do it now or wait until the witnesses—my short witnesses in and then Mr. Hartman, but I did want to renew my motions for judgment of acquittal that were made at the close of the Government's case, initially. Reminding the Court especially of the one count involving Amadee Roy where the only testimony has been is that he got the second count—

THE COURT: We will take that up after we get done at least and get the jury in now and start.

All right. Are you ready to go now then with respect [1650] to this next—what is the next witness's name?

MR. TREBON: Your Honor, I assume that the Court also denied my request for a continuance?

THE COURT: Yes: That request is denied.

Let's have the jury in.

(Whereupon the jury is returned to the jury box.)

THE COURT: All right, thank you, members of the jury. Mr. Trebon?

MR. TREBON: Your Honor, the defense would call as its last witness, Arnold Charley.

(Witness sworn.)

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[894] DIRECT EXAMINATION

BY MR. HUSK:

Q. Would you state your name and occupation for the record please?

A. My name is Cory Kay and—my name is Cory Kay and I'm not working now at the present time.

Q. Okay. How old are you, Cory?

A. 19.

Q. And when is your birthday?

A. November 2nd, 1969.

Q. And, Cory, where do you live?

A. In White Mesa.

Q. Is that on the Navajo Indian Reservation?

A. Yeah.

Q. And how long have you lived there?

A. All my life.

Q. Is that—is the White Mesa area near Kayenta?

A. Yeah.

Q. During the time that you lived at—on the reservation, have you known a person by the name of Verl [895] Hadley

A. No.

Q. Do you know Verl Hadley?

A. Yeah.

Q. And, when did you first meet him?

A. A few years back.

Q. Do you know about how old you would have been when you met him?

A. About 12 or 13 or 13 years old.

Q. And was he a teacher when you met him?

A. Yes.

Q. Do you know where he taught school?

A. Yeah, in Chilchinbeto Day School.

Q. Was he ever a teacher for you.

A. No.

Q. Did you go to Chilchinbeto ever?

A. Yeah, I did.

Q. But he wasn't a teacher when you were there?

A. Yeah, he was there.

MR. HUSK: Okay. Your Honor, I believe I am prepared to make the inquiries.

THE COURT: All right. Let me give you an instruction now, members of the jury, that you will be permitted to hear evidence of other similar sexual conduct to that charged in the indictment that allegedly occurred between Mr. Hadley and [896] Cory Kay.

You are permitted to consider evidence of other sexual conduct, which is not part of the charges of the indictment against Mr. Hadley here, only to the extent that they show motive, intent, preparation or planning.

Evidence that Mr. Hadley engaged in sexual relations with Mr. Kay, if so found, cannot be established as any evidence or proof whatsoever that he committed any of the acts charged in the indictment before you. That is to say, evidence that Mr. Hadley may have committed a similar act at an earlier time may not be considered by the jury in determining if Mr. Hadley is guilty of any of the offenses involved in this case.

In addition, you may not use evidence of the sexual acts between Mr. Hadley and Cory Kay to establish motive, intent, preparation or planning, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that Mr. Hadley did the particular acts charged in the indictment before you.

If you should find beyond a reasonable doubt from other evidence in the case, not involving Mr. Kay, that Mr. Hadley did the acts charged in the indictment before you, then you may consider evidence of sexual acts between Mr. Hadley and Mr. Kay to establish motive, intent, preparation or planning.

Q. BY MR. HUSK: Cory, has Verl Hadley ever had sexual [897] intercourse with you?

A. Yes.

Q. And would that be anal intercourse?

A. Yeah.

Q. About how many times would you say this occurred?
A. Couple of times.
Q. More than 10? Yes?
A. Yes.
Q. More than 20?
A. Less.
Q. So between 10 and 20 times?
A. Yeah.
Q. When did this first start happening, how old were you?
A. When I just came back from placement.
Q. How old would you have been?
A. About 12.
Q. Okay. And where would this occur?
A. At this place.
Q. At his place in Baby Rock?
A. Yeah.

MR. HUSK: If I could ask the bailiff to show you some photographs, please.

THE CLERK: 6A, B and C.

Q. BY MR. HUSK: Showing you what's been marked as Government's Exhibit No. 6A, B and C, do you recognize those [898] photographs?

A. Yes.
Q. What do those photographs show?
A. It is his place and this is where it took place right here in this trailer.
Q. That would be Verl Hadley's trailer?
A. (Affirmative response.)
Q. And that's the way it looked at the time you that were over there?
A. Yeah.

MR. HUSK: Your Honor, I would move for the admission of Government's Exhibit No. 6A, B and C.

MR. TREBON: No objection.

THE COURT: All right. Those exhibits are admitted without objection.

MR. HUSK: I would ask that they be submitted to the jury at this time.

Q. BY MR. HUSK: Cory, how would you usually get to Mr. Hadley's house?

MR. TREBON: Objection, Your Honor. May we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I object to Mr. Husk continuously referring to these prior events in such a [899] generalized way. That no particular act is proven or referred to in any way, whatsoever, makes it impossible for me to cross-examine on any particular act to get out the details of it to see if he is telling any kind of consistent story.

I think he's got to talk about specific acts, not just what did you do over the last lifetime.

THE COURT: Well, why don't you try to establish as best you can when the first act occurred and when they would—they would occur subsequently, et cetera, et cetera.

MR. TREBON: I would ask that they be related to the acts alleged in the indictment, on September 5th.

THE COURT: No. I'm not going to let him get into that.

MR. TREBON: Isn't that enough?

MR. HUSK: He's already testified between 10 and 20 times. I don't think that evidence is before the jury at this point.

THE COURT: Let's try to find out at least when the first times were and then get into some—try to establish the dates, when they occurred, so Mr. Trebon, to the extent he can, has that information available to him and what the pre-events were, so forth.

MR. HUSK: My intention, Your Honor, was to generally discuss what happened and get into the specifics, this is just in the way of foundation.

[900] THE COURT: The problem is, if you don't get back to the specifics, we have Mr. Trebon's concerns.

MR. HUSK: I do intend to do that.

(End discussion at bench.)

Q. BY MR. HUSK: Cory, do you remember something happening between you and Mr. Hadley on September 5th of 1985?

A. Yes.

Q. Can you tell us what happened that time? How did you get to Verl's house?

A. He picked me up.

Q. Excuse me?

A. He picked me up.

Q. Where did he pick you up?

A. Thriftway, Thriftway, from Thriftway.

Q. Why don't you hold that for you—talk directly into it. You say from Thriftway or Sam's place; is that right?

A. Yes.

Q. And, what time did he pick you up?

A. About 10:00.

Q. About 10:00 o'clock. Is that 10:00 o'clock in the morning or 10:00 o'clock at night?

A. Evening.

Q. What did he do when he picked you up, where did you go?

A. We went to his place first and then we came back into town.

[901] Q. Did you go back to his place again later?

A. Yeah.

Q. And who was with you when you went back the second time, was that just you and Verl or was someone else with you?

A. Just only us.

Q. What happened when you went to Verl's house the second time, can you tell us? Can you tell us what happened, Cory?

A. Yeah.

Q. Okay.

A. Well, we watched a movie in there for a while on the couch.

Q. You watched a movie there for a while on the couch?

A. Yeah.

Q. And, was that a TV movie or a video movie?

A. It was a video.

Q. And, what happened while you were watching the movie?

A. He told me to take off my clothes.

Q. And did you take off your clothes?

A. Yeah.

Q. Now, when this happened, Cory, were you smaller than you are now or were you the same size?

A. I was smaller.

Q. Were you smaller than Mr. Hadley?

A. Yes.

Q. Did Mr. Hadley ever go get anything?

[902] A. Beer.

Q. Did he ever go get lotion?

A. Yeah.

Q. What kind of lotion?

A. Ola, something like that.

Q. Ola?

A. Yeah.

Q. Could it have been Aloe?

A. Yeah, something like that.

Q. Can you describe what it was in?

A. It was a plastic container.

Q. What size?

A. About.

Q. Just show us with your hands about how?

A. Foot.

Q. A foot?

A. Yeah.

Q. What did he do with the lotion?

A. He put it on me and some on himself.

Q. After he put lotion on you, did he have anal intercourse with you?

A. Yes.

Q. When he first had anal intercourse with you, do you remember the position you were in?

A. I think I was on my back. I was on my back.

[903] Q. Did he also have intercourse with you while you were on your stomach?

A. Yes.

Q. Did he also have intercourse with you while you were on your hands and knees?

A. Yes.

Q. And did he have intercourse with you while you were on his lap?

A. Yes.

Q. Seated on his lap?

A. Yes.

Q. And each of those times, did he take out his penis and then put it in again?

A. Yes.

MR. TREBON: Objection, Your Honor, to these leading questions.

THE COURT: Sustained.

Q. BY MR. HUSK: How long did this occur, all these different times?

THE COURT: Now, are you talking about the September the 5th?

MR. HUSK: I will clarify, Your Honor.

Q. BY MR. HUSK: The incidents that you just described, did those all happen on September 5th, that same night?

A. Yes.

[904] Q. And, over what length of time, how long was it that you were there?

A. Five minutes, something like that.

Q. Okay, when it started. When did you leave his house?

A. In the morning.

Q. About what time?

A. About 7:00, dropped him off—he dropped me off over at my place.

Q. He dropped you off over at your place?

A. Yes.

Q. Did something—did another incident occur when you were hitch hiking?

A. Yes.

Q. Why don't you tell us what happened that time? Where were you hitch hiking from?

A. Blanding, Utah.

Q. Blanding, Utah?

A. Yes.

Q. And were you hitch hiking by yourself?

A. Yes.

MR. TREBON: Objection, Your Honor. May we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, correct me if I am wrong, but [905] I believe the record will show that on Friday he testified that the incident that he just talked about was the incident that occurred after he hitch hiked from Blanding, Utah, so Mr. Husk is going to use the hitch hiking reference as another way to talk about the same story and the jury will think it is another incident. Friday he described, that is the incident of September 5th.

MR. HUSK: Your Honor, those incidents are set forth in the Government's Motion in Limine in separate incidents.

THE COURT: Well, you can ask him now whether this was a separate incident from September 5th.

I confess I don't have any specific recollection. I know we got into this event, but whether this was September 5th or some other I can't remember at the minute.

MR. HUSK: I don't think it was really clear as a result of the hearing, I think it—

THE COURT: Why don't you try to establish, if you can, the time. You have got an event, now let's try to pick out when the time was, so at least Mr. Trebon will know that.

MR. HUSK: That's fine.

MR. TREBON: Oh, Your Honor, while we are up here maybe this is getting ahead of the game a little bit, but when I cross-examined him on Friday he admitted that when he made this—reported it to the Navajo Division of Public Safety he made it after they came to see him about raping a 14 year old, [906] if you recall, which he admitted that he did do on Friday. Am I permitted to ask him that, because that is prior sexual activity, I suppose, but the point is it shows a motive for falsifying a report, a motive to get the heat off of himself and on someone else, I think that is relevant.

THE COURT: We will take that up after the recess. We don't have to resolve that right now.

MR. TREBON: Okay.

(End discussion at bench.)

Q. BY MR. HUSK: Cory, do you remember when it was that you were hitch hiking? Do you remember what year or what month?

A. It was in the summer.

Q. Summer months?

A. Uh-huh.

Q. Was it before or after September 5th of 1985?

A. I can't remember.

Q. Okay. Did anything happen that night?

A. Yes.

Q. Tell us what happened. You said you were hitch hiking from Blanding?

A. I—

Q. You made it how far?

A. As far as Dennehotso.

Q. Dennehotso.

[907] THE COURT: Let me see counsel.

DISCUSSION AT BENCH

THE COURT: Well, it seems to me consistent with what I said before that we don't get into a bunch of sexual experiences with respect to propensity, that—subject to Mr. Trebon's position, you could ask a question having to do with the other activities, including his going to Mr. Hadley's house, some prior activities at the house, getting out the lotion bottle and then let it go at that, and then—because otherwise we are simply going to have a string of anal intercourse, end to end, without really dwelling on what are the specifics that I think are important. And that is that whatever they were, they were done about the same time.

We have a broad number now and it seems to me then that Mr. Trebon, to the extent that he would want to, could go into the details of them, but at least for the Government's presentation, I would think, if you said that—if you ask him a question, leading him in that respect, that the other activities were followed, a similar course, that they met and/or he went there, that—we haven't had any pinching. That might be something that you could inquire about as well, but then those kind of things occurred on the other occasions and Mr. Trebon can pursue them if he wants to. That seems, at least a better practice.

[908] MR. TREBON: Yes. To limit it to September 5th.

THE COURT: The September 5th and other general.

MR. HUSK: Oh, other general.

THE COURT: General activities, or similar, insofar as the meeting, where they would meet, and that they would then wind up at the house and out would come the bottle of lotion, you know, that sort of thing, rather than to get each time the bottle of lotion came outside, he was in 17 different positions.

MR. TREBON: I would object to leading questions on pinching. I don't think if he is led on that—he's never

said anything about a month. If he's asked, he will throw in any month. I object to Mr. Husk asking a leading question on pinching.

MR. HUSK: I'm going to have some leading questions. I don't intend to ask a pinching question, but I'm obviously going to have to ask some leading questions to get out of here as quickly as possible.

THE COURT: I think in a sense, summary, whatever just so we don't get all the details Mr. Trebon objects to.

MR. TREBON: I don't object to leading questions for guidance purposes.

THE COURT: All right.

(End discussion at bench.)

Q. BY MR. HUSK: Cory, how would you usually get to Mr. [909] Hadley's house?

A. I would get picked up.

Q. You would usually get picked up?

A. Yes.

Q. Where would you usually get picked up at?

A. In Kayenta.

Q. In Kayenta. And, was Mr. Hadley the person that picked you up?

A. Yes.

Q. And, was it Mr. Hadley—how—what was Mr. Hadley driving?

A. Maroon car.

Q. Maroon car. And when you went over to Mr. Hadley's house, did you usually go over there by yourself or were there other people there?

A. Sometimes.

Q. Sometimes there were other people there?

A. Yeah, just for a while though.

Q. Now, when you had anal intercourse with Mr. Hadley, were there other people there at that time?

A. No.

Q. None of the times was there anyone else there?

A. Nobody.

Q. And, when you had anal intercourse with him, did he always use the lotion?

[910] A. Yes.

Q. Cory, do you know the difference between a truth and a lie?

A. Yes.

Q. Do you understand that Friday you swore that you would tell the truth here in Court?

A. Yes.

Q. And are you telling the truth about what Verl did to you?

A. Yes.

Q. You are not lying about that?

A. No.

MR. HUSK: I have no further questions at this time.

THE COURT: Well, let me see counsel again.

DISCUSSION AT BENCH

THE COURT: At some time, I take it, Mr. Trebon is going to ask him who—he was a suspect in a rape case?

MR. TREBON: Yes, Your Honor. His answers with respect to that are clear from Friday. I believe he admitted that he was, and that he admitted that he had raped someone.

THE COURT: Was this in '83 or '85, do you know when the charge was?

MR. TREBON: It would have been in '85. That is when he first reported the crime to the Navajo Division of Public [911] Safety.

MR. HUSK: For clarification, that was not revealed until he went in for a physical examination. It was not revealed at the time they took the initial report.

In other words, the Navajo police were not present to interview him for that purpose. They were present regarding his complaint. He went to the clinic and at that

point in time the doctor at the clinic asked him if he had been involved in that, he indicated, yes. So, as far as the previous representation by Mr. Trebon, I think it is inaccurate. He did not report that to the Navajo police, that is not why the police were there.

MR. TREBON: He didn't report to the Navajo police, but that is one reason why they were questioning him.

MR. HUSK: No.

THE COURT: It is my understanding from what Mr. Husk says now, is that the reason the police went to him, was because of his complaints against Hadley and these other people?

MR. HUSK: Right.

THE COURT: And then after that, they found out about the—how did it come up?

MR. HUSK: Afterwards, he goes to see a doctor at the clinic. The doctor remembered hearing his name and she mentioned, "Weren't you involved with this other girl?" And [912] he indicated to her, yes, I believe is the report.

THE COURT: Well, let's stay away from that, at least until after—you will be with him for sometime, until the recess?

MR. TREBON: When is the recess?

THE COURT: Well, I don't know.

MR. TREBON: I will be with him for a little while, I could ask—I'm not clear, and I don't want to violate the Court's order, do I get to ask him, at the same time there was a complaint against Morris Singer and Yazzie, without asking if he had sex with them. I can ask if they were charged? I can't ask him that?

THE COURT: No, not now.

MR. TREBON: I wouldn't ask him if he had prior sex with them.

MR. HUSK: Same thing.

THE COURT: If you ask him, Mr. Husk can ask him about matters such as that, I suppose, but again I think those go to his credibility and whether they are precluded from 412.

You haven't made—to the extent it is 412, you haven't made any kind of a proper showing, or a timely showing, to the extent of its credibility or arguably credibility, I think it violates Rule 412 and it simply will lead us to other problems and procedures, so the fact that he made the complaint, I don't think is going to be admissible [913] now at this time for those purposes.

MR. TREBON: Well, Your Honor, the ruling that this witness was going to be allowed to testify about prior acts was not actually made until yesterday.

I don't know when I was supposed to make a timely showing with respect to these prior bad acts.

THE COURT: Insofar as 412 is concerned you were supposed to make them some time ago in a certain fashion, with respect to credibility, I rule on that now.

And I'm saying that it is not—it is part of 412 and to admit it would violate 412, also under 403, would lead us to other activities and delay and confuse the jury.

MR. TREBON: So I can only ask him about the fact that he previously made the allegation against Mr. Hadley, not include Morris Singer or Sampson Yazzie at all?

THE COURT: Well, if we get into Mr. Hadley, we have got the same problem. He made them and withdrew them.

MR. TREBON: I certainly can ask him that.

THE COURT: How can you ask him that?

MR. TREBON: I'm going to ask isn't it true that he made these allegations against Mr. Hadley back in 1985 and talked to Sergeant Laughter?

THE COURT: And asuming, yes, he did. Then what?

MR. TREBON: I'm going to ask him what he told them, an inconsistent story about what he is saying now.

[914] THE COURT: I will sustain the objection to that as well, for the same reasons that I have stated.

MR. TREBON: Your Honor, I'm not—my whole right to confront this witness is gone if I can't ask him what

he's previously said about the same case, those prior inconsistentent statements.

(End discussion at bench.)

THE COURT: Members of the jury, let me ask you to step in the jury room for just a few minutes and we will get you right back in.

(Whereupon the jury is excused from the courtroom.)

THE COURT: All right, Mr. Trebon?

MR. TREBON: Your Honor, I understand 412 limits prior sexual activity.

THE COURT: I can't hear you.

MR. TREBON: I know that Rule 412 limits prior sexual activity. I want to ask the witness about the previous time that he reported this incident, what he told them about it then and so forth.

Those are simply prior inconsistent statements from his testimony today. I don't think the 412 in any way limits my ability to do that, the fact that he made a charge and the fact that he later refused to prosecute.

THE COURT: The fact that he later refused to prosecute [915] doesn't have anything to do with whether he made the prior inconsistent statements. Now if you have prior inconsistent statements, that is something else.

MR. TREBON: I think he's already testified on Friday that the reason that he didn't go forward was because he couldn't get a ride, that is all I would ask him now.

THE COURT: That isn't a prior inconsistent statement, insofar as these proceedings is concerned.

MR. TREBON: It is relevant to why someone would make a charge and then not proceed further.

THE COURT: Well—

MR. TREBON: I'm not talking about a prior unrelated charge, I'm talking about the charge related to the same incident.

THE COURT: If you have prior inconsistent statements, that he didn't do it, or this or that or whatever,

then you can go into those matters. But we are not going to get into whether or not he had a ride or anything like that. That is just confusing and misleading to the jury and it is going to take up time and it is impeachment on an immaterial or collateral proposition, as far as I am concerned.

MR. TREBON: Your Honor, you don't think that the credibility of this witness can be judged on what he did with the same incident previous, that he made—

THE COURT: Not as to whether or not he withdrew the [916] charge because he didn't have a ride.

MR. TREBON: I know I can show evidence that he did, so that—

THE COURT: That he had a ride?

MR. TREBON: Yes.

THE COURT: Then, so what? That is my reaction to that. Doesn't impeach him in any way insofar as something material for the jury's consideration is concerned.

MR. TREBON: I belies the credibility of the witness, Your Honor. We are talking about the same incident that he's accused Mr. Hadley of today that he has accused him of earlier, his conduct.

THE COURT: He said that he did it because he didn't have a ride over and you want to prove that he had a ride over.

MR. TREBON: Exactly.

THE COURT: All right. Well, I am saying that is impeachment on an immaterial and collateral point and wouldn't in any way be determinative of any issue here, or we just get into then whether or not he had a ride or didn't have a ride, et cetera.

If you have prior inconsistent statements about what he said here before the jury, then I will permit you to do that.

MR. TREBON: Your Honor, I agree that this no longer becomes just a question of impeachment. Now I think the Court [917] has simply precluded me the chance to confront and cross-examine the witness at all.

THE COURT: You are not precluded from cross-examining him about anything he said in this courtroom before this jury. And to prove any of his statements are inconsistent.

My understanding was when we were over by the side bar that the officer said—you were going to present evidence that the officers were going to say that his recounting of the event of the incident were different than what he's testified before the jury.

MR. TREBON: That is part of what I want to do.

THE COURT: You can do that, but not whether or not he had a ride over.

MR. TREBON: Well, whether or not he refused to testify.

THE COURT: He never refused to testify, because he was never subpoenaed and not called.

MR. TREBON: I have testimony that will show that he did refuse to testify.

THE COURT: Was he subpoenaed and didn't show up?

MR. TREBON: He signed a declaration for officer Wiseman and said that he would not willingly testify in the case. That is very, we feel—

THE COURT: Why can't they show that, Mr. Husk?

MR. HUSK: I'm not sure I understand the issue. The [918] Court is asking why they can't introduce evidence that—

THE COURT: That he refused to testify.

Then we come back to why did he refuse to testify and we are off on that.

MR. HUSK: I think so. And I think the Cardinal case addresses that very issue, the case provided to the Court, that the Court's discretion regarding, you know, how much it can get into that type of stuff is the final issue in that matter and I think Cardinal restricted that.

MR. TREBON: Your Honor, the Cardinal case dealt with a prior charge that was withdrawn that was unrelated to the case under question.

THE COURT: Well, it seems to me then, if you get into that aspect of it as well, it is simply going to mislead and confuse the jury and the Government will then have the right to say that there is now a charge pending in federal court in this case involving Mr. Kay and Mr. Hadley out of that incident.

The fact that someone withdraws a charge, doesn't seem to me, is—goes to any issue in this case and it simply is impeachment on some other point and we are going to get confused and mislead the jury and take up time as to the relevance or the importance of that. That is impeachment on some point that you are bringing up and it just isn't going to serve any purpose here, Mr. Trebon.

[919] MR. TREBON: Shows the intent and motive of this witness.

THE COURT: Why is there any intent or motive, if he withdraws a charge, to testify falsely here? Not at all. And particularly when there is a—it misleads the jury because there is presently pending a charge in which Mr. Kay is the victim.

MR. TREBON: Well, we know he has reinstituted the charge and that is what he is saying today.

THE COURT: Pardon?

MR. TREBON: We know he has reinstituted the charge and that's what he's testified to today.

THE COURT: If you bring that out, then the Government can bring out the fact, it seems to me, that the charge is reinstituted and is pending.

MR. TREBON: I'd hardly get evidence from this witness as to that. I'm trying to bring out evidence of what this witness knows, what he did in relation to the charge, not what the United States Government did in relation to it.

THE COURT: The Government can bring out, seems to me, that there is then a charge pending. Whether or not he prosecutes or not—and if he withdraws the

charge, it seems to me that that simply is going to mislead, confuse the jury, take up time and get in arguably the fact that there is presently pending a charge. Why we do it, all those kind of [920] matters, are then things we have to get into.

MR. TREBON: His credibility is in issue, the fact that he withdrew the charge certainly relates to it. I ask the opportunity to cross-examine on that area.

THE COURT: Well, I will deny it at this time for the reasons that I have stated.

MR. TREBON: May I make just a verbal offer of proof, now or—

THE COURT: Well, you say you have a document, let's—why don't we use the document?

MR. TREBON: Your Honor, I have a—certainly. Would you like a—I could introduce, for partial proof, offer of proof, the Navajo Division of Public Safety reports that relate to this.

THE COURT: You said you had a report, Mr. Trebon, that he signed asking to withdraw the charge.

MR. TREBON: Your Honor, I didn't say I had such a document. I didn't say I had it.

THE COURT: Where is it?

MR. TREBON: I subpoenaed the document. The Navajo Division of Public Safety has lost the document. So now I only have the verbal testimony of Officer Wiseman relating to the document, although his report says it is attached. The problem is, it is no longer attached.

What the report does say—

[921] THE COURT: Well, I will sustain the objection at this time. We will take that back up after the next recess, if you want to.

But again I want to make sure, Mr. Trebon, and I'm not being critical of you, but when you tell me something, I want you to tell me all the details. And if you didn't have the report, I certainly had the clear impression that you had a document signed by the witness.

Now, if you had given me the explanation the first time, that would have been much better insofar as my being able to judge some of these things are concerned, because whatever I was going to do was based upon your representation that there was such a document. Now we get into whether there was or wasn't or where is it and what it said, et cetera.

MR. TREBON: Here is what the report says. I'm sorry, I didn't mean to represent that I had the document, but that he did sign it.

When Mr. Kay was asked if he still wished to press charges—

THE COURT: Read slowly now, speak into the microphone.

MR. TREBON: This is Ruben Wiseman report, dated February 20th of 1986, relating to the incident that supposedly occurred September 5 of 1985.

The Navajo Division of Public Safety, Case No. 06-85-05686. This is page 7 of 7.

[922] "When Mr. Kay was asked if he still wished to press charges, he stated that he did not want to. He wanted to drop the charges he had made against Verl Hadley, Sampson Yazzie and Morris Singer.

"On January 31, 1986 at approximately 9:44 hours, Mr. Kay signed a declaration, which was explained to him. His declaration states, he, Cory Kay would not testify willingly if the case was brought to court."

Then it goes on to summarize other evidence.

THE COURT: Well, we will—make me a—Mr. Myer will make a copy of that for me and I will look at it during the recess.

Let's go into some other areas, if you have any. If not we will take a longer recess while we do that.

MR. TREBON: No, Your Honor. I can consume some time with other areas.

THE COURT: All right. Let's get have the jury in.

MR. TREBON: If I go slow, it is because I am trying to refer to my notes and keeping within the Court's rulings.

THE COURT: That's all right.

(Whereupon the jury is returned to the jury box.)

(Whereupon the witness resumes the witness stand and testifies further as follows:

[923] CROSS EXAMINATION

BY MR. TREBON:

Q. Morning, Mr. Kay, how are you?

A. Pretty good.

Q. My name is John Trebon and I represent Mr. Hadley in this matter and I'm going to ask you some questions.

You're 19 years of age; is that right?

A. Right.

Q. And, I believe on Friday, when you testified out of the presence of the jury, didn't you say that you had never been to the Chilchinbeto Day School?

A. What?

Q. Pardon? I think today you said that you were a student at the Chilchinbeto Day School; is that right

A. Yeah, I was there when—preschool, I think it was.

Q. What year was that?

A. I'm not sure.

Q. Did you ever see Mr. Hadley there?

A. Yes.

Q. On Friday, didn't you testify that you had never been a student at the Chilchinbeto Day School?

A. That was a mistake.

Q. How long were you a student there?

A. Just for a year, and then I went on placement.

Q. And what year was that that you were a student?

[924] A. 1980.

Q. And how old were you at that time?

A. About, about 11.

Q. You said that—today, I believe that Mr. Hadley picked you up in a maroon car; is that right?

A. That's right.

Q. And this is something we talked about on Friday as well. Didn't you tell us then that you saw the same car outside of the courtroom?

A. Yeah.

Q. The car that Mr. Hadley had picked you up in was the same car that he was driving now; is that right?

A. Yeah.

Q. And that you had seen the car parked outside the courthouse on Friday; is that right?

A. That's right.

Q. And that that car used to be maroon in color; is that right?

A. Yeah.

Q. And it is a different color now; is that right?

A. Yes.

Q. That you knew Mr. Hadley had painted the car?

A. No.

Q. Isn't that what you said on Friday?

A. No.

[925] Q. But you are sure that the car that he picked you up in is the same car that he is driving now?

A. Yes.

Q. Now, you previously talked to a Sergeant Laughter and a Ruben Wiseman about this incident of September 5th, did you not?

A. Only Raymond Laughter.

Q. Pardon?

A. Only Raymond Laughter.

Q. And that was in 1985; is that right?

A. Yeah.

Q. Today you reported that Mr. Hadley picked you up on September 5th to take you out to his trailer; is that right?

A. That's right.

Q. How many people were there?
A. There were—
Q. It was just you and Mr. Hadley?
A. Yes.
Q. The entire evening?
A. Yes.
Q. Where did you meet Mr. Hadley?
A. At the Thriftway, I think it was.
Q. Do you remember previously telling Sergeant Laughter that Mr. Kay had told—or Mr. Hadley had told you to wait at the 7 to 11 Store for him, but that he never came?
[926] A. No.
Q. And then you hitch hiked out to Mr. Hadley's residence to see him? Did you tell Sergeant Laughter that?
A. I can't remember.
Q. Did you ever tell Sergeant Laughter that you partied with a bunch of people out there, not just Mr. Hadley, but a bunch of other people as well?
A. His friends.
Q. Were they out there on September 5th?
A. I can't remember.
Q. Well, you just told us that you were alone. Were you alone or were you with other people out there?
A. We were alone.
Q. The entire evening. You need to answer out loud, I'm sorry?
A. Yes.
Q. When you first met with Mr. Hadley on September 5th, was Sampson Yazzie and Morris Singer and Arnold Dohi also present?
A. I think so.
Q. And you know all those individuals?
A. Yes.
Q. Did all of those individuals go out to Mr. Hadley's house with you?
A. Yes.

[927] Q. And this is the September 5th incident?
A. Yes.
Q. And is that a party in which you drank a lot of alcohol?
A. Yes.
Q. Did you have several mixed drinks?
A. Yes.
Q. And then during that party, did you—let me ask you this, before you drank on September 5th, you had drank before, had you not?
A. Nope.
Q. You had never been drinking before whatsoever?
THE COURT: Now, let's be specific. That night or some other time.
Q. BY MR. TREBON: Before September 5th?
A. No. I was not drinking.
Q. Pardon?
A. I wasn't drinking.
Q. You weren't drinking on that evening?
A. No.
Q. September 5th of what year did this happen do you know?
A. I can't remember.
Q. How do you know it was September 5th?
A. I was there.
Q. How do you know the date?
[928] A. Well, it was between some time in that day.
Q. But now you are telling us you can't tell what year it was; is that right?
A. No.
Q. Prior to the time that you went out to Mr. Hadley's trailer on this supposed incident, did you drink alcoholic beverages before?
A. No, not until after I got there.
Q. Well, other than that night just—
A. No.

Q. Let me ask the question, because I think we may have miscommunicated.

As a general proposition do you drink alcohol?

A. Yes.

Q. And, do you get drunk?

A. No.

Q. You never get drunk?

A. No.

Q. Before September 5th of 1985, did you drink alcohol?

A. Yes.

A. If it was offered.

Q. And would you get drunk?

A. Yes.

Q. Now, on September 5th, now that is the time that you are talking about, did you or did you not drink?

[929] A. Yes, I drank.

Q. You did drink? Did you get drunk?

A. Yes.

Q. How much did you have to drink?

A. Several—several cans and shot glasses.

Q. All right. Shot glasses of what?

A. Of Gin, Bacardi, that's all I can remember.

Q. And isn't it true that after you drank on that evening that you passed out?

A. Yes.

Q. And that when you woke up your clothes were off; is that right?

A. Yes.

Q. And isn't it also true that you merely assumed that Verl Hadley had sex with you, since he was the only one there when you woke up?

A. Yes.

Q. And that you assume someone had sexual relations with you, because you had hickey's is on your neck and other physical signs of sex; is that right?

A. No.

Q. Why did you assume that someone had sex with you?

A. Because—because he was right beside me at that time.

Q. But it is true isn't it, sir—

A. Yes.

[930] Q. —that you do not remember Mr. Hadley having sex with you at all on September 5th; isn't that true?

A. No.

Q. You do remember or you don't?

A. I do a little bit.

Q. Well, isn't it true that you passed out and you didn't wake up until the next morning.

MR. HUSK: Objection, Your Honor, that question has been asked and answered.

THE COURT: That's true.

Q. BY MR. TREBON: Isn't it true that you weren't awake when anyone, if anyone did, when anyone had sexual relations with you that night?

A. I was up for a while.

Q. Isn't it true that you were not awake when anyone, if anyone, had sexual relations with you that night?

A. No. He is the one that did that.

Q. Pardon?

A. No. He is the one that did that.

Q. My question is, isn't it true that you weren't awake, you were not awake when this occurred, when sexual acts supposedly took place?

A. Yes.

Q. Now, when you talked to the Navajo Division of Public Safety, you never told them about any previous incident when [931] you hitch-hiked from Blanding, Utah, did you?

A. No.

Q. Isn't it true that when you were interviewed by the FBI they told you that if a criminal case was successful against Mr. Hadley, that you could sue him for money?

A. No.

Q. Didn't the FBI tell you at that time too that Verl Hadley did this with other people too?

A. Yes.

Q. You talked to the FBI numerous times, haven't you?

A. What?

Q. You have talked to the FBI numerous times, haven't you?

A. Yes.

Q. But they didn't tell you you could sue anyone then; is that right?

A. No.

MR. HUSK: Objection, that's been asked and answered.

THE COURT: True.

MR. TREBON: Your Honor, may I have an exhibit marked to show it to the witness.

THE COURT: Certainly.

THE CLERK: Exhibit D marked for identification, D.

MR. TREBON: Here is a copy for the Court.

Q. BY MR. TREBON: Mr. Kay, do you remember a time that I interviewed you on October 6 of 1988 at your home in White [932] Mesa?

A. Yes.

Q. And, was someone else present with me at that time?

A. Yes.

Q. And do you see her in the courtroom today?

A. Yes, your partner.

Q. Ms. Linton, stand up. Is that the woman that was with me?

A. Yes.

Q. And, I asked to take a tape recorded statement from you at that time, did I not?

A. Yes. And I said no.

Q. And you refused to allow me to use a tape recorder; isn't that true?

A. Yes.

Q. But instead we tried to write down what you had to say and then you read over—or I read the statement over for you and you signed it; is that right?

A. Yes. I didn't want to, though.

Q. Did you sign the statement?

A. Yes.

Q. Was the statement true and correct?

A. Yes.

Q. It is what you told us; isn't it?

A. Yes.

[933] Q. And do you see the statement before you that's been marked for identification purposes as Defendant's Exhibit D?

A. What?

Q. Do you have a document before you, a piece of paper before you?

A. What about that?

Q. Is that the statement that you signed on October 6 of 1988?

A. This one?

Q. Yes.

A. Yes, I put my initials on there, just only my initials CK.

Q. And CK stands for Cory Kay?

A. That's right.

Q. Is there three pages to that document that is ahead of you?

A. Yes.

Q. Has paragraphs numbers one through sixteen?

A. Yes.

Q. And it has your initials at the end of it; is that right?

A. Yes.

Q. And also didn't you put a K on the first and second page as well?

A. Yes.

[934] Q. Does that look like the true copy of what you signed back on October 6 of 1988?

A. Yes.

MR. TREBON: Your Honor, I would move for the admission of Exhibit D.

MR. HUSK: Your Honor, may I voir dire the witness on the statement.

THE COURT: Well, why don't we do this, let's take a recess. We have had the jury up and down, in or out.

Members of the jury, we will take a 20-minute recess and then we will probably go until 12:30, unless some of you have some particular problem, that will get you all in a restaurant more conveniently as well. So we will go that way and try to make up some of the time.

So we will take a recess now until 11:20.

(Whereupon the jury is excused from the courtroom.)

THE COURT: All right. Let's take a—we will come back at a quarter after and then we can discuss any matters and give the court reporter a minute to relax. All right?

(Whereupon a recess was taken.)

THE COURT: First off, Mr. Husk wanted to have some voir dire about the statement and I suppose that really is going to be more cross-examination than voir dire, circumstances, matters such as that.

[935] MR. HUSK: Yes. I can certainly hold off on that. I guess my general objection to the admission of the statement is that it is hearsay and it does not fall under any of the hearsay exceptions.

THE COURT: How about that?

MR. TREBON: Well, Your Honor, he just admitted he made the statement and that the statement was true. It is no longer hearsay.

THE COURT: Well, he can say the same thing here. Sometimes that's what I wonder about.

MR. TREBON: He did say here that he had made the statement on October 6 and it was true and correct.

MR. HUSK: Your Honor, my problem is—and perhaps this was the foundation that—this was the foundation that I was going to get at is he indicated that first of all the FBI did not say—

THE COURT: Well, you can go into those things with him. We had the statement that somebody else had under the same circumstances, we admitted that.

MR. HUSK: I understand that, Your Honor, but in that instance that was adopted entirely. This one—

THE COURT: The same problem. You can go through that with him later on about it. How it was prepared and whether everything they said got in there or just these things, so forth, you know.

[936] MR. HUSK: My problem, Your Honor, this would be like submitting a police report. It is hearsay and it is authored by the defense, and you know, I think it starts opening some—a Pandora's box if we start allowing individual reports to go to the jury.

I don't have any—he has established what was said in this and I don't have any problems with him bringing that out during testimony, but to actually admit the report itself I think in this particular instance is most inappropriate. It would be like a police report.

MR. TREBON: Your Honor, there is a separate rule on police reports.

THE COURT: Well, we will find out, because we are going to discuss the police reports next.

Well, it seems to me that the—are you—you will be cross-examining about this as well—or examining on this on redirect, weren't you?

MR. HUSK: Right, Your Honor. My only objection to it is it being submitted to the jury. Again it's—it's like submitting a police report to the jury.

THE COURT: Well, and of course under certain occasions someone can submit a police report.

Well, I will withhold admitting it until after Mr. Husk's examination.

Now, let's go back again to some of the other problems [937] that we have and that I see coming. We might as well try to talk about them.

We have had questions about the police report and whether or not statements were made or not made in the police report.

At some time we are going to have the problem of whether all or some part of the police report is admissible and we are going to—we might as well be thinking about that, so that we can try to discuss—consider those matters over the recess, because sometime, it seems to me, we are going to get into Rule 106, a part of a writing. And as to whether other portions of that police report ought to come in. And also whether or not some of the statements in the police report—Mr. Trebon has selectively used some of them—whether some of the statements in there are admissible as prior consistent statements.

MR. TREBON: As it turns out from my review of the police report over the break in light of the Court's ruling so far, the only statement I'm going to bring out in the police report is how he was picked up.

THE COURT: You already brought out some others, Mr. Trebon, already, so I am simply saying we are going to review that at some time as well.

MR. TREBON: They are all covered by my statement, so I'm going to rest my impeachment on Cory Kay's prior [938] statement.

THE COURT: Well, you have already gone into the police report and in fact suggesting that some of the stories are of recent fabrication, so that is something we will consider later on, Mr. Trebon, now—and as to particular parts of it. So, that is something else that we have to talk about.

And one of the problems, of course, is, as I say, that we are now getting into the principal part of our proceeding is becoming Mr. Kay, rather than the charges against this gentleman.

MR. TREBON: That is certainly my concern.

THE COURT: And you are not doing anything that eases that fact, Mr. Trebon.

MR. TREBON: Tell me what to do.

THE COURT: No, I'm not telling you what to do. I am telling you we are here and we are going to work through it as best we can under the rules.

The other matter that you wanted to get into was Mr. Kay's withdrawal or what he did say with respect to not wanting to pursue the matter.

MR. TREBON: Right.

THE COURT: And I will permit you to do that. And then I will permit Mr. Husk to go into other matters related to that.

But arguably, the jury could think that the fact that [939] he didn't want to press the charges might somehow implicate his credibility, or his truthfulness here with respect to those charges.

So if you want to bring that in or up, why then we can see where that leads us.

MR. TREBON: Still stay away from Sampson Yazzie and Morris Singer?

THE COURT: Pardon?

MR. TREBON: I'm still not to mention Sampson Yazzie and Morris Singer in terms of charges against them?

THE COURT: First off, with respect to Mr. Singer, there is certainly no motivation there that I can see because Mr. Singer admitted that he had sexual relations with Mr. Kay.

And, I think that that at the moment, at least—yes, we will stay away from that, just as we would stay away from Mr. Hadley's aspects of those interviews.

MR. TREBON: Okay.

THE COURT: All right?

Well, that's where we are. Are we ready for the jury then? Okay, let's have the jury in.

(Whereupon the jury is returned to the jury box.)

THE COURT: All right, thank you. Then we will go on.

(Whereupon the witness resumes the witness stand and testifies further as follows:)

[940] CROSS EXAMINATION (Cont'd)

BY MR. TREBON:

Q. Mr. Kay, when you signed this statement on October 6 of 1988, it was read to you before you signed it; isn't that true?

A. Yes.

Q. And, everything in that statement was true at the time that you signed it; isn't that true?

A. No. There is just one other part where—

Q. Okay. Are you referring to—there was one part that you didn't agree with and you crossed it out; is that right?

A. Yes.

Q. And is that on paragraph 16 of the last page?

A. Yes.

Q. And, the lines that you didn't agree with you crossed out and put your initials on; is that right?

A. Yes.

Q. Do you see that on paragraph 16 where the line is crossed out and your initial is there?

A. Yes.

Q. Okay. Is that the part you are referring to that wasn't true?

A. Go on.

Q. Pardon me?

A. Go on.

[941] Q. That's the part that you crossed out that wasn't true; is that right?

A. Yes.

Q. All the other statements in this—in this statement are true; is that right?

A. Yes.

Q. And the things that I wrote down, this is in my handwriting; isn't it?

A. Yes.

Q. And I wrote this as you were talking to me; is that right?

A. Yes.

Q. And I wrote these things down because you didn't want me to use a tape recorder; is that right?

A. Yes.

Q. And, I wrote the things down as you told them to me, correct?

A. Yes.

Q. But then we read them to you before you signed the statement?

A. Yes.

Q. And all the other statements in this document, except for the part that you crossed out are true and correct; isn't that right?

A. Yes.

[942] Q. And that all the other statements in here are things that you really told us; isn't that true?

A. Yes.

Q. Okay. I'm going to ask you to read the statement at this point. Can you read it in English or is that difficult for you to do?

A. Which paragraph?

Q. Let's say if you start with paragraph one?

A. I can read it, but right now I do not want to.

Q. All right. Well, in paragraph one you told us that, "About 9:00 o'clock p.m. that you met Sampson Yazzi, Arnold Dohi and Morris Singer and Mr. Hadley at the Circle K in Kayenta. I was buying a pack of cigarettes and it was winter." Is that right?

A. Yes.

Q. And paragraph number two, you say that, "Sampson Yazzie was a Navajo and an adult. He had short styled hair, he was tall"?

A. Yes.

Q. "Arnold Dohi was a Navajo and an adult. He had short black hair. He was of medium height"?

A. Yes.

Q. "Morris Singer is a Navajo and an adult. He had short brown hair. He was small"?

A. Yes.

[943] Q. "Verl Hadley was a Navajo and an adult. He had short black hair. He was medium"?

A. Yes.

Q. These are all things that you said, right?

A. Yes.

Q. "There was about 10 more people at the Circle K, they were all Navajo males, they were adults. I don't know their names"?

A. Yes.

Q. Paragraph three says, "We all went to Verl's house, someone said, 'let's go party,' so I came along for the party"?

A. Yes.

Q. Paragraph four says, "I had drank alcoholic beverages before. I knew I was going to drink." Is that right?

A. I can't remember.

Q. Okay. Paragraph five says, "I had several mixed drinks at Verl's trailer. Everybody was drinking, about 14 or 15 people. I got drunk. I had about four drinks"?

A. More than four drinks.

Q. You had more than four drinks. Number six, "Then I passed out. I was passed out for several hours. When I woke up all of my clothes were off"?

A. Yes.

Q. Number seven, "I assumed Verl had sex with me, since he [944] was the only one there when I woke up. I was still drunk when I woke up"?

A. Yes. And he gave me another can. He gave me another can of beer after I waked up.

Q. At this point, Mr. Kay, I am just asking you to go over the statement to see if these are things that you told us.

Number eight says, "I assumed someone had messed around with me, because I had hickey's on my neck, my penis hurt too, my butt hurt too"?

A. Yes.

Q. Number nine, "I wasn't awake when anyone had sex with me or messed around with me." Is that right?

A. Part of the time.

Q. That's what you said back on October 6, at least, isn't it?

A. Yes.

Q. Number 10 says, "I can't remember the date when this incident occurred—that this incident occurred." Is that right?

A. Yes.

Q. Number 11, "We all stopped at the Thriftway store, after we met at Circle K?

A. Yes.

Q. Number 12, "The FBI said if I won the criminal case, I could sue Verl"?

[945] A. Not really.

Q. Is that what you told us on October 6?

A. Well, not for the money, though.

Q. What would you sue him for?

A. Sue him for what he did.

Q. Number 13 says—you sue someone for money, don't you?

MR. HUSK: Objection, Your Honor, calls for a legal conclusion.

THE COURT: Sustained.

Q. BY MR. TREBON: Number 13 says, "The FBI said Verl did this with other people too"?

A. Yes.

Q. Number 14 says, "I talked with the FBI three times"?

A. Yes.

Q. Number 15 says, "The time described in the statement is the time I told the FBI about being in different positions with Verl parenthesis (on stomach, on back, on hands and knees and on his lap) period"?

A. Yes.

Q. 16, "I was told that someone else could repeat what I said about Verl at trial"?

A. Yes.

Q. And you crossed out the part that says, "And that I wouldn't have to be there." Is that right?

A. Yes.

[946] Q. And then finally, the statement says, "I have read the statement. It is true and correct, it is what I told Mr. Trebon. I did not want him to use a tape recorder. Mr. Trebon read the statement to me. Dated October 6, 1988." Is that right?

A. Yes.

Q. And then it has your initials?

A. That's right. And how about that other one, the one—

THE REPORTER: Say again?

A. There is one other paper with him and he wanted me to sign it.

Q. What other paper would that have been?

A. You wanted me to drop the charges.

Q. You think I had such a paper? Could that have been—

A. I was there.

Q. —somebody else?

A. No.

Q. All right. Do you remember Ms. Linton being there?

A. Yes. She was walking over to the trees at that time.

Q. Okay. So everything that you told us and that was in that statement was true and correct on October 6; is that right?

A. Yes.

MR. HUSK: Objection, that's been asked—

THE COURT: That's been asked and answered.

[947] Q. BY MR. TREBON: Isn't it true that, Mr. Hadley(sic), rather than me showing you a piece of paper that an officer by the name of Ruben Wiseman in February of 1986, or January 31 of 1986, talked to you about this case?

A. No.

Q. You don't remember that? Do you remember at that time that you signed a piece of paper with him that said that you would not willingly testify in this case?

A. I don't remember.

Q. Do you remember that you—

THE COURT: Well, now just to clarify it. It wasn't in this case.

Q. BY MR. TREBON: I'm sorry, in the case that—in the report that you brought with the Navajo Division of Public Safety involving the same incident?

A. Yes.

Q. That would have been a case with the Navajo Tribe?

A. Yes.

Q. In Navajo Trial Court; is that right?

A. I think so. I don't remember.

Q. But it involved the same incident that took place on September 5 of 1985 with Mr. Hadley, correct?

A. That's right.

Q. And, isn't it true that you refused to testify in that case.

[948] MR. HUSK: Objection, Your Honor, as to the form of the question.

THE COURT: I think the question was before as you described it. That he said he would not willingly testify.

Q. BY MR. TREBON: Is it true that you told him that you would not willingly testify?

A. Yes. I didn't want to. I didn't want to go through it.

Q. Okay. Why was that?

A. Because we didn't have a vehicle. We didn't have a vehicle at that time. And I didn't know that—I didn't know that they can bring you up here.

Q. Did you—did he refuse to give you a ride to court, the officer?

A. I don't remember.

Q. Did you testify here on Friday that the officer involved in the case refused to give you a ride to Court?

MR. HUSK: Objection, Your Honor, that is a complete mischaracterization of what the testimony was.

THE COURT: I will sustain the objection at this time.

Q. BY MR. TREBON: Didn't you say on Friday here that you couldn't get a ride from the officers to go to Court?

A. Yes.

Q. So the reason that you dropped the charges then, in Navajo Tribal Court, not here, but in Navajo Tribal Court, in [949] 1985, is because you couldn't get a ride to court. Is that what you are saying?

A. Yes.

Q. And the officers involved in the case wouldn't help you get a ride; is that right?

A. Yes.

Q. Isn't it true that in 1985 that you were also taken to see a doctor at the hospital?

A. Yes.

Q. And at that time, isn't it true, that you discovered that you had venereal warts?

A. Yes.

Q. And isn't it true that you had to get some treatment for those?

A. Yes.

Q. When you talked to officers within the Navajo Division of Public Safety, you were 16 years of age at that time, weren't you?

A. Yes, I think so. I don't remember.

Q. Did the FBI tell you that you wouldn't have to testify at trial if you made a statement against Mr. Hadley, that somebody else could do that for you?

A. Yes.

MR. TREBON: May I have just a moment, Your Honor?

THE COURT: Uh-huh.

[950] MR. TREBON: No further questions, Your Honor.

THE COURT: All right, thank you.

Mr. Husk?

* * * *

[1337] Q. Mr. Hadley, have you provided students rides in your vehicle during your teaching at Chilchinbeto?

A. When I was—yes.

Q. And isn't it true that you provided rides to students on a regular basis to the Kayenta swimming pool?

A. Approximately once a month.

Q. Did you ever provide rides to students who may have been at the Thriftway store?

MR. TREBON: Objection, Your Honor, relevancy.

THE COURT: Overruled.

THE WITNESS: Any students in particular or?

Q. BY MR. HUSK: Any students in general?

A. I knew some high school students that were—that would be—that would—that would be at the Thriftway Store yes.

Q. Say students from the ages of 10 to 15 years of age, did you ever provide students rides in—just in the Kayenta area, what is commonly known as cruising, with students of that age?

MR. TREBON: Objection to foundation.

THE COURT: Overruled.

[1338] THE WITNESS: Most of the students I knew in Kayenta were high school students.

Q. MR. HUSK: I understand that, but that wasn't my question. My question said between the ages of 10

and 15, have you ever provided rides to those students where you just went cruising around Kayenta in your car?

A. I don't believe, no.

Q. So if there were students within that age group that said that they had—

MR. TREBON: Objection, Your Honor, may we approach the bench?

THE COURT: Certainly.

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I object because these questions are irrelevant, number one. Number two, there has been no testimony from anyone in Mr. Husk's case or during our case that there are rides provided to students at the school and if he is trying to set up impeachment on a collateral matter, I object to that, because those would be other bad acts that he's never sought in his motion to introduce and weren't introduced yet, so far. I object if they are introduced, if they come later, but to ask Mr. Hadley about them now to—it's collateral, I think they are irrelevant to ask Mr. Hadley now.

[1339] THE COURT: I don't understand that line of reason.

MR. TREBON: There has been no testimony from any of the witnesses.

THE COURT: Why would there have to be? He can ask this man first, can't he?

MR. TREBON: To get a denial simply so he can—no, I don't think he is allowed to ask this witness matters that have nothing to do with this case, just so he can bring in witnesses at a later time to try to impeach him on a collateral matter.

THE COURT: Whether it would be collateral or not, seems to me it has relevance and he is entitled to cross-examine him about matters that are relevant to all of these discussions that we have been having and he brought out incidents involving that. You brought up the Thrift-

way Store. I think also every time he answers a question "I don't believe so," Mr. Husk is entitled to pursue him. That is not an answer. And he did that repeatedly with you.

MR. TREBON: His answers—his question is vague as well.

THE COURT: Well, in your questions he said innumerable times "I don't believe so."

MR. TREBON: Well, we are here on his objection—my objection to his question now.

THE COURT: Your objection is overruled.

[1340] MR. TREBON: The question is vague about whether or not—what time is he referring to?

THE COURT: Find out whether this was this age, that age, or whatever.

MR. HUSK: Certainly.

THE COURT: All right, let's proceed on.

(End discussion at bench.)

Q. BY MR. HUSK: I believe you testified that you have not ever provided rides to children from the Thriftway Store around Kayenta within the age group from say 10 to 15 years of age. Was that your testimony?

MR. TREBON: Your Honor, I object to foundation as to when this incident took place.

THE COURT: This is ever and then we can—

MR. HUSK: I will narrow it down.

THE COURT: Then we will pursue it further.

THE WITNESS: I might have on certain occasions, dropping them off at their home or something of that nature.

Q. BY MR. HUSK: Okay. So earlier when you said that you did not, that was not accurate; is that correct?

MR. TREBON: Objection, Your Honor, asked and answered.

THE COURT: His answer before was "I don't believe so," so let's proceed on.

Q. BY MR. HUSK: Have you ever had any of your current students over to your home?

[1341] MR. TREBON: Objection, Your Honor, as to particular persons involved.

THE COURT: Well, rephrase the question, because we are going to get into quote "current students" and we know he is not teaching.

Q. BY MR. HUSK: Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as a guest?

MR. TREBON: Object as to relevance.

MR. HUSK: It's irrelevant?

THE COURT: Well, now, both of you. Now I'm the one that makes the rulings. The objection is overruled.

MR. HUSK: Thank you, Your Honor.

Q. BY MR. HUSK: Did you understand my question?

A. Repeat it, please.

Q. Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as guests?

A. Well, my nephews are in that age range, yes, they would come over.

Q. Have you ever had Amadee Roy over to your house?

A. No.

Q. He's never been to your house?

A. No.

Q. Have you ever had any people, other than relatives within that age group over to your home?

[1342] A. No, I don't believe so, no.

Q. Have you ever provided alcohol to any minor students at your home?

MR. TREBON: Objection, Your Honor.

THE COURT: Overruled.

MR. TREBON: My objection is relevancy grounds.

THE WITNESS: I confine my use of alcohol to those persons who are 18 or over.

Q. BY MR. HUSK: That wasn't my question.

Have you ever provided alcohol to students that are minors under 18 years of age—under 21 years of age?

A. No, I don't believe so, not in my home.

Q. Have you done it anyplace else?

A. No.

Q. Isn't it true, Mr. Hadley, that you have a reputation for touching some of the male students in your classes?

MR. TREBON: Objection, Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I think the record should show my strongest objection to all of these matters. This is a character assassination. If he's going to prove him guilty of something that is supposed to be the charges in the case, not did you do this or that, no.

THE COURT: Do you think, Mr. Trebon, he's confined to [1343] asking him whether he had sex with X? I don't think so. I think he is entitled to go into all these matters, particularly in view of your examination and his answers that would paint himself as something who doesn't do any of these things and hasn't done any of these things and they are all relevant insofar as his activities are concerned with these students and whatever.

MR. TREBON: And especially the reputation thing. That is strictly character, strictly forbidden by 404. He can't ask him—

MR. HUSK: He puts his character in issue when he takes the stand.

MR. TREBON: For truth and veracity alone.

THE COURT: I think any character trait is irrelevant, but in any event—

MR. HUSK: My particular angle, Judge, is he brought out through his witnesses that this man never touches any students, people.

MR. TREBON: I have?

MR. HUSK: You had witness from the school that said they never saw that.

THE COURT: Are you going to have somebody say that that is his reputation?

MR. HUSK: Yes, I am.

THE COURT: I will overrule the objection.

[1344] MR. TREBON: Let the record show not only my objection, I believe that it violates the rule on character and I believe that it turns the case into a character assassination case. In the event the stuff comes in, I move for a mistrial. And I would like the record to show a continuing objection.

THE COURT: You make objections as you consider it appropriate, but I would do it less obstreperously. It looks like you are going down for the 9th count, so just object and if you want a side bar, come up. We are not in final argument yet, so save it for those times.

MR. TREBON: All right.

(End of discussion at bench.)

Q. BY MR. HUSK: Isn't it true, Mr. Hadley, that you have a reputation for touching the male students in your classes?

A. Could you define touching, please?

Q. Sure. Isn't it true that you have a reputation for tickling male students in the chest area?

A. I believe in a playful manner, or if I am instructing in a classroom.

Q. Mr. Hadley, I asked the question, if you would just restrict yourself to answering that question.

A. In a playful manner.

Q. And isn't it true that you also have tickled students in the back area?

MR. TREBON: Your Honor, I object on relevancy grounds. [1345] I would like the record to show a continuing objection, so that I don't have to object to each question.

THE COURT: Well, with respect to touching in the back you can have a continuing objection. Anything else we will discuss as we go along. The objection is overruled.

Q. BY MR. HUSK: You also tickle—have a reputation for tickling students in the back area; isn't that true?

A. In a playful manner.

Q. Isn't it also true that you have a reputation for tickling students in the thigh area?

MR. TREBON: Same objection.

THE COURT: Same ruling.

THE WITNESS: In a playful manner.

Q. BY MR. HUSK: Do you think it is appropriate behavior for a teacher to tickle his or her students even in a playful manner?

MR. TREBON: Objection, irrelevant and argumentative.

THE COURT: Overruled.

THE WITNESS: Certainly not in the classroom. However, outside on the playground where there is a less restricted area, I think it is appropriate.

Q. BY MR. HUSK: Mr. Hadley, you testified that you were the acting principal for a period of time; isn't that true?

A. Yes, I did.

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[1353] Q. You never allowed any minor students to drive your vehicle, any minors, any people that did not have a license?

[Mr. Hadley]: No.

MR. HUSK: Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. HUSK: Your Honor, I have here a list of citations received by the defendant. One on 5-19-1976 in which he was cited for allowing an unauthorized person to drive his vehicle. The Government is prepared to present the witness—the testimony of the Department of

Public Safety officer, who [1354] provided that citation, who will indicate that the person driving that vehicle was a minor and that he was so cited. I would ask at this point in time the opportunity to impeach the witness regarding that, based on his assertion.

MR. TREBON: Your Honor, number one, he needs to have a certified copy of a conviction.

MR. HUSK: Not for impeachment. I can ask him.

MR. TREBON: You can ask him if he was convicted, but he has to stand by the answer. I don't think you have to show the piece of paper.

MR. HUSK: I am prepared to do that, or certainly allow—or to rely on the officer coming in to testify later on.

MR. TREBON: That doesn't indicate it is a minor person, so I would object to him showing him that particular document.

MR. HUSK: I can ask him the question, I believe, Your Honor.

THE COURT: Well—

MR. TREBON: I also think that this again is a collateral issue, that under 403 is confusing to the jury, they are not particularly pertinent to any issue in the case.

THE COURT: Was he in the car or any of those kind of things?

MR. HUSK: Yes, he was.

[1355] THE COURT: On that occasion?

MR. HUSK: Yes, he was.

THE COURT: Well, since it's in the nature of the same kind of acts, so forth, I think it may have some relevance, so I will overrule that objection. But you avow, Mr. Husk, that you have a witness who will come now and with the records and be able to establish that, when it happened, and that that—and the details of it by certified copy of the police records?

MR. HUSK: I'm not sure I have certified copies of the police records, but I have a copy of the citation. The officer can recall distinctly Mr. Hadley. He will be able to

identify Mr. Hadley, will be able to indicate he gave him the citation on that date, and describe the circumstances under which it was issued.

MR. TREBON: I don't believe that that is probative. You are not allowed to bring in extrinsic evidence for impeachment.

THE COURT: I think for the defendant it may be true—or for a general witness. I think I have allowed it here. But where you get somebody that is even a percipient witness, important witness, I think you can bring in extrinsic evidence. You know, it is—it happens regularly, for instance, where there is a government informant, they impeach them on everything from the kitchen to the sink.

MR. TREBON: Your Honor, unless he's got a conviction [1356] document, certified copy of a conviction, then I would object to having a DPS officer coming to testify about the fact of the case.

THE COURT: The DPS officer can testify that he stopped him, what he saw, what he observed, so forth, so I will overrule the objection. All right.

(End of discussion at bench.)

Q. BY MR. HUSK: Mr. Hadley, isn't it true that on May 19th of 1976, in the Monument Valley area, you were stopped by an Arizona Department of Public Safety officer and cited for allowing an unauthorized person to drive a vehicle and that person was in fact a minor; isn't that true?

A. That's true. I understood the question—I understood the question previously that I thought you were making a reference to my students at Chilchinbeto Day School.

Q. Who was that person that you were allowing to drive the vehicle?

A. I believe the kid's last name was Vanarsdale or something like that. Vanarsdale or something. It's been some time I don't remember his first name.

Q. Was he a relative?
A. No.
Q. Had he been asking to drive your vehicle?
A. Excuse me?
Q. Had he asked you to drive your vehicle?
[1357] A. Yes, he did.
Q. And how old was he?
A. I don't remember his exact age.
Q. General age?
A. 13, 14 maybe less, I don't know the exact age.
Q. And was he a student of yours at the time?
A. No.
Q. Was he a former student?
A. No.
Q. He was not a student at all at Chilchinbeto School?
A. No.
Q. Had he been a student at Kayenta?
A. I believe he was a student at the Kayenta public schools.
Q. Is that how you had met him through your association with the school?
MR. TREBON: Objection relevancy, Your Honor.
THE COURT: Overruled.
THE WITNESS: Most likely, yes, because I worked there at the school seven years prior to working at Chilchinbeto.
Q. BY MR. HUSK: Again I ask you, Mr. Hadley, wasn't that a little unusual to allow a minor to operate your vehicle?
MR. TREBON: Objection, relevancy.
THE COURT: Well, I will sustain the objection, it is argumentative.

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[1375] Q. Mr. Hadley, isn't it true that you felt you were a hindrance to society, because of your attraction to young male children?
A. That is not correct.

Q. And do I understand your testimony to be that you have never engaged in any sexual acts with minors?
MR. TREBON: Objection, Your Honor.
THE COURT: Answer the question.
MR. TREBON: May we approach the bench?
THE COURT: Surely.

DISCUSSION AT BENCH

MR. TREBON: I object again, these are questions that go to propensity, character, and do not relate to anything specific in the case. He can't ask open ended questions about whether or not there has been any prior bad acts in his life, or whether or not he's had any homosexual relations or anything. I move the question not be allowed, that he be advised not to answer it, and any more questions. Based on this and the other questions that were asked on direct(sic), that we were at the bench about, and the ones following those that I objected to on relevancy, I move for a mistrial.
[1376] THE COURT: Mr. Husk?
MR. HUSK: My position is that Mr. Trebon questioned him regarding his prior sexual activity with minors. I'm certainly entitled to come back and ask him if he's had sex with minors before. Based on that statement, there may be prior bad acts that may become admissible. But until that's established I'm not in a position to go into it.
THE COURT: I think you did go into those matters, Mr. Trebon.
MR. TREBON: I didn't ask him whether or not he ever had sex with anyone.
MR. HUSK: I said minors I didn't say with anyone.
MR. TREBON: I didn't ask him if he ever had sex with any minors. I asked about people involved in the case only.
THE COURT: That's true.
MR. HUSK: I'm not restricted, Your Honor?

THE COURT: I think his having sex with minor children and at least in Amadee Roy's case, anal intercourse, that is something that Dr. Bendheim certainly thought was some kind of characteristics, at least in this field, and unusual, that that has relevance. And I think we have to keep in mind also as we go through this process, that with respect to 608 and 611(b), and I don't see this as that problem, he has a right to—with respect to purely credibility matters, that he couldn't have anticipated, and the right to object to those [1377] kind of matters, but insofar as this is concerned, certainly it is a broad question. But, I think that you have the right to ask, if you have specifics. I think it would be much better certainly insofar as the—

MR. HUSK: My intent, Your Honor, is to ask the general question and then come down to the specifics.

MR. TREBON: Those would be—prior bad acts have never been allowed by the Court. You can't ask about unsolicited prior bad acts, open ended questions, it is not—none of it is admissible under 404.

MR. HUSK: We know what the answer is going to be. It's going to establish that he is—

MR. TREBON: Why are you asking the questions?

MR. HUSK: Because I am laying the foundation for the rebuttal.

MR. TREBON: I don't think he is allowed to do that. I think the Court is going to get in a position of clearly reversible error to ask the questions and solicit—

THE COURT: He can impeach. This isn't calling someone to impeach them, knowing they are going to give a false answer or give an answer, that is what he knows it is going to be. You can tell that from what he is saying now, all of these things, so let's proceed and then get to specifics. I think it is appropriate that we do get the specifics.

MR. HUSK: I will ask the one question and I will get [1378] to the specifics.

MR. TREBON: Before the specifics, the Court should have a hearing outside the presence of the jury about the appropriateness of any prior bad act testimony.

MR. HUSK: I don't intend to bring prior bad acts. I am asking one question. If he's ever had any. I think that is different from introducing prior bad acts. I certainly intend to have such a hearing prior to anything coming in before the jury.

THE COURT: All right. On that basis, I will—

(End discussion at bench.)

Q. BY MR. HUSK: Mr. Hadley, is it your testimony here today that you have never had sexual intercourse with any minor males?

A. That's correct.

Q. And is it your testimony here today, specifically, that you never engaged in anal intercourse with Amadee Roy?

A. That's correct. I did not.

Q. And is it your testimony here today that you never engaged in anal intercourse with Cory Kay?

A. I did not.

* * * *

[1663] DIRECT EXAMINATION

BY MR. HUSK:

Q. Will you state your name for the record, please?

A. Kyle Hartman.

Q. And, Kyle, where do you currently reside?

A. In Durango, Colorado.

Q. And, Kyle, you understand you have previously been sworn as a witness and have taken an oath to tell the truth?

A. Yes, I do.

Q. And you realize you are still under oath?

A. Yes, I do.

Q. How old are you, Kyle?

A. I am 27.

Q. And, can you tell us the education that you have had, if any?

A. I have a Bachelor of Arts degree in music, which I received in April of '87 and I graduated cum laude.

Q. Where did you attend elementary and high school?

A. In Kayenta, Arizona.

[1664] Q. And what grades did you attend there in Kayenta?

A. First through 12th.

Q. Did you end up graduating from that school there?

A. Yes, I did. I was second in class rank.

Q. Is that Monument Valley High School?

A. That's correct.

Q. During the time that—or first of all, let me ask something in the way of background. How was it that you resided in Kayenta, came to reside in Kayenta?

A. My parents were employees of School District 27. My father was a librarian and my mother was a kindergarten teacher.

Q. Is School District 27 the Kayenta School District?

A. Yes, it is.

Q. At some point in time during your education, did you have an opportunity to meet the defendant, Verl Hadley?

A. Yes, I did.

Q. And what grade was it that you first met him?

A. 4th grade.

Q. 4th grade?

A. Yes.

Q. And approximately how old would you have been at that time?

A. About nine.

Q. Did you also have various occasions to come in personal [1665] contact with the defendant, Verl Hadley?

A. Yes, I did.

Q. And specifically, did you have occasion to have sexual contact with Verl Hadley?

A. Yes.

THE COURT: At this time, Mr. Husk, let me remind you, members of the jury, I read this instruction to you previously and let me give it to you again now.

You are permitted to consider evidence of other sexual conduct, which is not part of the charges of the indictment against Mr. Hadley here, only to the extent that they show motive, intent, preparation or planning.

Evidence that Mr. Hadley engaged in sexual relations with Mr. Hartman, if so found, cannot be established as any evidence or proof whatsoever, that he committed any of the acts, he, Mr. Hadley charged in the indictment before you.

That is to say, evidence that Mr. Hadley may have committed a similar act at an earlier time may not be considered by the jury in determining if Mr. Hadley is guilty of any of the offenses involved in this case.

In addition you may not use evidence of sexual acts between Mr. Hadley and Mr. Hartman to establish motive, intent, preparation or planning, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that Mr. Hadley did the particular [1666] acts charged in the indictment before you.

If you should find beyond a reasonable doubt from other evidence in the case, not involving Mr. Hartman, that Mr. Hadley did the acts charged in the indictment before you, then you may consider evidence of sexual acts between Mr. Hadley and Mr. Hartman to establish motive, intent, preparation or planning.

MR. HUSK: Thank you, Your Honor.

Q. BY MR. HUSK: Kyle, how did you know the defendant?

A. He was a teacher's aid in the intermediate department.

Q. What do you mean by intermediate department?

A. It was grades 4th, 5th and 6th.

Q. Did you have sexual contact with the defendant?

A. Yes, I did.

Q. And was that approximately on four different occasions?

A. That's correct.

Q. And from what time period did these instances occur?

A. 5th grade through my freshman year in high school.

Q. So that would have been 1972 or 1971-72?

A. Yes.

Q. And when was it that you graduated from high school?

A. May of 1981.

Q. So that would have been approximately 1977, '76, '77?

A. Somewhere around there, yes.

Q. Did one of those incidents occur, the first incident, [1667] occur at the defendant's home?

A. Yes, it did.

Q. And where was his home at the time?

A. At Baby Rocks.

Q. Was it a—what type of home was it?

A. It was a trailer.

Q. Do you remember the color of the trailer?

A. It was green and white.

Q. What occurred on this occasion? This would have been in the 5th grade; is that correct?

A. Yes. He had invited me out to his house and when I got out there, he wanted me to put on a pair of swimming trunks, which I did. And, when I came back out of the bedroom, he wanted me to lie down on the bed with him and take a nap. And he sort of tickled me, and sort of started wrestling with me, and the next thing I know, he put his hands down the front of the trunks that I had on and grabbed my penis and kept his hand there and then he asked if I wanted to feel his, and I said, no, I did not. And then he asked one or two more times, and I said, I didn't and I was able to—

Q. Were you able to leave then shortly thereafter to change?

A. Yeah. I don't remember how I got away, but I remember that I did. And I went into the other bedroom and changed back into my clothes and—

[1668] Q. Kyle, if I may ask you, I believe you indicated that you were nine in the 4th grade. Would you have been 10 years old at the time of this incident, in 5th grade?

A. Yes.

Q. Was there also a second incident between you and Mr. Hadley?

A. Yes, there was.

Q. And approximately how long after that first incident was the second incident?

A. I'm not sure. It might have been a year, give or take a couple of months, I'm not positive.

Q. Where did that incident occur?

A. That occurred at his trailer at Baby Rocks.

Q. Was anybody present on that occasion besides the two of you?

A. There was nobody else present.

Q. What happened on that occasion?

A. He wanted me to lie down on the bed with him again. He might have had me put the trunks on, I'm not positive. At any rate, he was lying behind me and took the trunks, or whatever it was I was wearing, off. And he then tried to make—put two or one or two of his fingers in my rectum, and he then proceeded to insert his penis inside of me and engaged in intercourse and ejaculated in me.

Q. Did he say anything to you while he was doing that?

[1669] A. He kept asking me to let him in.

Q. There was a third incident that occurred; is that correct?

A. That's correct.

Q. Where did that occur?

A. That occurred at my house.

Q. How long between the second and third incident?
A. It was about the same time frame.
Q. Approximately a year?
A. Approximately.
Q. What happened on that occasion at your home?
A. He had called up and I believe my mother had answered the phone. And, I talked to him and he wanted to come over. And I said that he couldn't, because, you know, my parents were still there, they were getting ready to leave for the weekend. And, he subsequently came over later on. And after he got there, he suggested that we go to my bedroom and get into bed and he tried to snuggle and then wanted to engage in intercourse again, which I told him I didn't want him to, and he did anyway.
Q. Did he use a lubricant on this occasion?
A. Yes, he did.
Q. Do you know what it was he used?
A. It was either lotion or vaseline, I don't remember.
Q. Did he engage in intercourse to the point of [1670] ejaculation on this occasion?
A. Yes, he did.
Q. There was also a fourth incident; is that correct?
A. That's correct.
Q. And was that the final incident?
A. That's correct.
Q. I believe you testified that this would have been when you were a freshman in high school?
A. That is also correct.
Q. Will you tell us about what happened on that occasion?
A. I had called him up and asked him to come over and he did, and he wanted to engage in intercourse and I didn't want to. And then he suggested that I engage in intercourse with him, which I did for approximately five minutes and I stopped and asked him to leave.
Q. Did you ever have any conversations with Mr. Hadley as to why this had occurred?

A. Yes. I had asked him why he had done this to me and he said it was because I was cute and that he still thought I was cute.
Q. Mr. Hartman, have you ever told anyone else about the details of this incident?
A. No, I have not.
Q. Did you discuss with the attorneys involved in this case the details which you related?
[1671] A. Yes, I have.
Q. When was the first time that you spoke with anybody about the details involving your activities with Mr. Hadley?
A. Last Thursday.
Q. And who was it that you spoke with?
A. I spoke with Bill Forsythe.
Q. And who is he?
A. He is an FBI agent from Colorado.
Q. Were you at all familiar with Mr. Hadley's case?
A. I had read of his arrest last summer when I was living in Phoenix.
Q. At that time, did you consider calling the FBI or the U.S. Attorney's office?
A. I had thought about it, but not on a very deep level or very seriously.
Q. What influenced you to provide this information at this point in time?
MR. TREBON: Objection, Your Honor.
THE COURT: Sustained.
MR. HUSK: I have no further questions.
THE COURT: All right, thank you. Mr. Trebon?

CROSS EXAMINATION

BY MR. TREBON:

Q. Mr. Hartman, you said that you first came forward with [1672] this evidence last week; is that right?
A. That's correct.

Q. And when were you interviewed for the first time by the Government's attorney?

A. Friday, after I got here to Prescott.

Q. That would have been last Friday?

A. That's correct.

Q. And, when was the first time that I ever got to talk to you about these events?

MR. HUSK: Objection, Your Honor.

THE COURT: You can establish when you talked to him.

MR. TREBON: That's what my question was.

Q. BY MR. TREBON: When did I get to talk to you?

THE COURT: No. Just the way—

MR. HUSK: Objection, Your Honor.

THE COURT: —the way the question is phrased is objectionable. You can ask him when you talked to him.

Q. BY MR. TREBON: When did I talk to you?

A. Last night.

Q. And was that the first time I talked to you?

A. Yes.

Q. And did I ask you then about who you knew and who your teachers were and where you have lived and questions of that nature?

A. Yes.

[1673] MR. TREBON: No further questions.

THE COURT: All right, thank you, sir. You may step down.

MR. TREBON: Your Honor, I request that we approach the bench.

THE COURT: All right.

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I feel the procedure that —I must move for a mistrial, because the evidence is— I would so move. I would also point out too that with the Court's instruction, that question about that Mr. Hadley thought he was real cute, and that is why he did it, was absolutely inappropriate in every event and shouldn't have been allowed. That, with all the other evidence in, I believe is so prejudicial and inappropriate in this case, in light of the fact that intent is not an issue, that I ask the Court for a mistrial.

THE COURT: Well, with respect to the last question, we heard the same thing before and I don't recall any discussion about whether he would or wouldn't make that comment. If we would have discussed it earlier, we could have come to some conclusion, but in any event it is in the record and I don't think it will do anything more than highlight it now if we struck it. So the motions are denied.

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[EXHIBIT I]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Case No. 88-127-EHC)

U.S.A.

v.

VERL HADLEY

INTERVIEW WITH JONATHAN TSOSIE

March 29, 1989

JT Hi. What is your name?

Jon Jonathan Tsosie.

JT I am going to ask you a few more questions. O.K. Jonathan. Today's date is March 29, 1989. Is that right?

Jon Yea.

JT My name is John Trebon and I'm Verl Hadley's lawyer. I've told you that, right? And I'm talking to you where at, where are we at?

Jon Pause—no response to question.

JT At school?

Jon Yea.

JT What school is this?

Jon Chilchinbeto School.

JT And what grade are you in?

Jon Fourth grade.

JT O.K. And Dayna Linton is here. She's an investigator, right? I introduced you to her, right?

DL Hi Jonathan.

Jon No response to question.

JT Right?

Jon No response to question.

JT You need . . .

DL You have to say yes.

JT We want you to talk out loud.

Jon Yes.

JT O.K. And who else is with you today?

Jon Marlene Singer.

JT And who's Marlene Singer?

Jon No response to question.

JT Do you know who she is? Who is she?

Jon No response to question.

JT She's right there, I guess. Does she work at the school here?

Jon Yea.

JT O.K. Is she somebody you know? Do you know Marlene?

Jon Yea.

JT O.K. Um, I was asking, you said that one time last year Verl Hadley gave you a ride home from school. Is that right? You need to speak out loud.

MS Talk loud.

Jon Yea.

JT And that's because you missed the bus, is that right?

Jon Yea.

JT O.K. And why did you miss the bus again?

Jon No response to question.

JT How did you miss the bus?

Jon Getting my books and my coat.

JT O.K. and when you were getting your books and coat, the bus took off?

Jon Yea.

JT O.K. And Verl Hadley gave you a ride home to your house, is that right?

Jon Yea.

JT And you were living with your parents then, is that right?

Jon Yea.

JT Who's your parents? Do you know their names?

Jon John Tsosie.

JT Jonathan Tsosie.

Jon No. John Tsosie.

JT And John Tsosie, I'm sorry, your Jonathan aren't you? And your dad is John. Is that right?

Jon Yea.

JT And who's your mom?

Jon Laverne Tsosie.

JT Laverne Tsosie. Who are you living with right now?

Jon Eddie Roy and Josephine Roy.

JT Eddie Roy and Josephine Roy. And where is your house at? By White Mesa?

Jon Yea.

JT O.K. Is that pretty far from here or pretty close?

Jon Pretty far.

JT Pretty far. You can't walk that far, can you?

Jon Yea.

JT You can?

Jon No.

JT It would be a long walk, hah?

Jon Yea.

JT O.K. So you get a ride usually when you go that far hah?

Jon Yea.

JT O.K. Now you said that when you got a ride home with Mr. Hadley, you know Mr. Hadley's a teacher out here, I guess, right?

Jon Yea.

JT O.K. And how old are you?

Jon Nine.

JT O.K. And what grade where you in when he gave you a ride home?

Jon Third grade.

JT Third grade. And was it hot out or cold out when this happened?

Jon Hot.

JT But do you know what month it happened in?

Jon No.

JT O.K. And when Mr. Hadley gave you a ride home, you said that he touched you, is that right?

Jon Yea.

JT That he pinched you, I'm sorry.

Jon Yea.

JT That he pinched you. O.K. Where did he pinch you at?

Jon Right here.

JT O.K. Where did you point to, your arm?

Jon Yea.

JT O.K. Which arm?

Jon Left.

JT Left arm, and did he touch you anywhere else?

Jon No.

JT O.K. Did Mr. Hadley do any, why did he pinch you, do you know?

Jon No.

JT Did he say anything to you?

Jon No.

JT Is that the only time that Mr. Hadley has ever touched you?

Jon Pause—no response to question.

JT Has he touched you any other times? He he pinched you any other times?

Jon Sometimes.

JT Pardon?

Jon No response to question.

JT Is this the only time that you've ever got a ride home with him?

Jon Yea.

JT Has he ever touched you any other time?

Jon Yea.

JT When?

Jon Long pause—I don't know?

JT Has he ever pinched you any other time, I mean, by any other do you know what I'm saying? Sometime other than the time in the car?

Jon Yea.

JT You understand that? Has he pinched you any other time?

Jon Yea.

JT When was that?

Jon I don't know.

JT Where did he pinch you then?

Jon Long pause—no response to question.

JT You said he pinched you in the arm when you were getting a ride home. Is that right?

Jon Yea.

JT O.K. Is that the only time he's pinched you.

Jon No.

JT O.K. When else did he pinch you?

Jon Last year.

JT Pardon?

Jon Last year.

JT O.K. Some other time that you haven't told us about, yet?

Jon Pause—no response to question.

JT Was there another time?

Jon Hah?

JT Was there another time? Or just one time?

Jon Another time.

JT O.K. When was the other time?

Jon No response to question.

JT Do you know?

Jon No.

JT No. Where did he pinch you the other time?

Jon Right here.

JT On you leg.

Jon Yea.

JT Where at on your leg?

Jon Right here.

JT Right above the knee?

Jon No response to question.

JT Above the knee?

Jon Yea.

JT O.K. And which leg was that on?

Jon Right.

JT O.K. Um. Where were you at when that happened?

Jon In the gym.

JT Were there other people there too?

Jon Yes.

JT What were you doing in the gym? Was there a sporting event or something?

Jon No. Playing.

JT Playing what?

Jon No response to question.

JT Basketball?

Jon No.

JT What were you playing in there?

Jon Long pause—No response to question.

JT Tag? Do you remember what you were playing?

Jon Yea tag.

JT Tag. Is that where you touch somebody and then you try and touch somebody else?

Jon Yea. Their it.

JT And their "it", right? Their "it" until they touch somebody else?

Jon Yea.

JT Is that tag?

Jon Yes.

JT O.K. We use to pay tag when I was a kid too. So you still play that, ha?

Jon No response to question.

JT O.K. I'm sorry, can you answer out loud. You still play tag, ha?

Jon Yes.

JT And was Mr. Hadley playing tag too?

Jon No.

JT O.K. He just came up and pinched you on the leg?

Jon No.

JT Pardon?

Jon No.

JT What did he do?

Jon Long pause—I don't remember.

JT O.K. But you say he pinched you on the leg or touched you on the leg?

Jon Leg.

JT Leg, and that was in the gym?

Jon Yea.

JT With everybody else there too? A bunch of kids were in there playing?

Jon Yea.

JT O.K. Were there any other teachers in there too?

Jon Yes.

JT Who? What other teachers where in there?

Jon Long pause—No response to question.

JT Do you know their names?

Jon No.

JT But there were other teachers in there too?

Jon Yea.

JT O.K., and a bunch of other kids in there too, ha?

Jon Yea.

JT A lot of kids?

Jon Yea.

JT And did he say anything to you? Did he say hi Jonathan?

Jon No.

JT What did he say?

Jon Long pause—no response to question.

JT What did he say?

Jon Long pause—no response to question.

JT You don't remember?

Jon Yea.

JT Yea what?

Jon Pause—no response to question.

JT Do you remember or you don't remember?

Jon Don't remember.

JT O.K. But he said something to you, I take it, ha?

Jon Yea.

JT O.K. Was he playing with the kids in the gym too?

Jon Yea.

JT Ah. Was he supervising the kids?

Jon Yea.

JT O.K. Do you usually have, when you have a recess, where you on recess, is that why you were in the gym?

Jon Yea.

JT And do you usually have a teacher in there to supervise you?

Jon Yea.

JT Do you know what supervise means?

Jon Yea.

JT To watch over you, ha?

Jon Yea.

JT O.K. So Mr. Hadley was helping watch over all the kids in the gym?

Jon Yea.

JT Was he playing too?

Jon No.

JT He was just watching, ha?

Jon Yea.

JT Did he talk to kids in there too?

Jon Yes.

JT And are you one of the kids he talked to?

Jon Yea.

JT And when he was doing that, did he touch you or pinch you? He pinched you on the leg?

Jon Yea.

JT O.K. Did it hurt?

Jon Yea.

JT Did it hurt real bad? Or just a little?

Jon Just a little.

JT Was he kind of playing with you?

Jon Yea.

JT Just kind of teasing you a little bit?

Jon Yea.

JT O.K. Now when he pinched you in the arm in the car, was he just teasing you and playing with you a little bit then too?

Jon Yea.

JT O.K. Has Mr. Hadley ever hurt you?

Jon Yes.

JT By pinching you?

Jon Yea.

JT And has he ever done anything else besides that?

Jon No.

JT O.K. Any other times that he's pinched you?

Jon No.

JT Just those two times?

Jon Yes.

JT O.K. Is this what you told the F.B.I. about?

Jon Yes.

JT O.K. Now I ask you. Did the F.B.I. say anything to you about Mr. Hadley?

Jon Yes.

JT What did they tell you about him?

Jon Long pause—They said what did Verl Hadley do to you?

JT O.K. They asked you what he did to you, ha?

Jon Yea.

JT And how did they know he'd done anything to you?

Jon No response to question.

JT Do you know?

Jon Yes.

JT How?

Jon I don't know.

JT You don't know. Um. What did they . . . Did they say anything about Verl to you? That they knew he was a bad guy or that he hurt little boys or anything like that?

Jon Yea.

JT What did they say?

Jon Long pause—no response to question.

JT Can you tell me what they said?

Jon I don't know.

JT Did they say he was a bad guy?

Jon Yes.

JT Ah. Did they say that "we know he's touched other boys so we think he's done it to you too".

Jon Yea.

JT Is that what they told you?

Jon Yea.

JT O.K. Did they tell you who else he supposedly touched?

Jon Yes.

JT Who?

Jon Amadee Roy.

JT Amadee Roy. Who else?

Jon Pause—no response to question.

JT Did they say anybody else?

Jon No.

JT Did they tell you what he did to Amadee Roy supposedly?

Jon No.

JT They just said "we know that he touched Amadee Roy"?

Jon Yea.

JT Have you ever talked to Amadee Roy about this?

Jon No.

JT Did Amadee Roy ever tell you that Verl touched him?

Jon No.

JT Just the F.B.I. told you that, ha?

Jon Yea.

JT Do you remember the F.B.I. person's name that talked to you?

Jon Long pause—No.

JT O.K. Was the F.B.I. a white guy or was he an Indian guy?

Jon White guy and Indian guy.

JT There was an Indian guy too. Do you remember the Indian persons name?

Jon No.

JT Was he Navajo?

Jon Yea.

JT Did he speak Navajo?

Jon Yes.

JT Did you interview in English. Did you talk to them in English or Navajo?

Jon Navajo.

JT Do you understand English pretty well?

Jon Yes.

JT You understand everything I'm saying here today?

Jon Yes.

JT And if you don't understand something you can ask Marlene to help us out in Navajo, is that right?

Jon Yes.

JT O.K. What other things did they say about Verl Hadley? They said he was a bad guy though ha?

Jon Yea.

JT Did they say what they should do to Verl Hadley or that something has to be done with him or anything like that?

Jon No.

JT What else did they say? Can you tell me?

Jon I don't know.

JT Did they say that he was a bad guy before you told them that he pinched you?

Jon Yea.

JT Is that what they started talking to you about?

Jon Yea.

JT Did they say that we know that he's touched Amadee Roy. Did they say that he pinched Amadee Roy?

Jon No.

JT What did they say?

Jon Touch.

JT Touched. They said that he touched Amadee Roy, right?

Jon Yea.

JT And they told you that before you told them about Verl pinching you.

Jon No.

JT They told you that after?

Jon No.

JT Do you understand my question? When did they tell you that he touched Amadee Roy? At the beginning of the talk?

Jon Pause—no response to question.

JT When they first started talking to you?

Jon Yes.

JT O.K. Did they tell you about Amadee Roy before. Do you know what the word before means?

Jon Yea.

JT Did they tell you about Amadee Roy before you told them about Verl pinching you?

Jon No.

JT Pardon?

Jon No.

JT When did they then? When did they tell you about Amadee. When did they tell you that Verl had touched Amadee Roy?

Jon Long pause—no response to question?

JT At the beginning?

Jon Yes.

JT O.K. So was it before or after you told them about Verl giving you a ride home in the car?

Jon Yes.

JT Was it before or after that they told you about Amadee Roy?

Jon Before.

JT Before. O.K. Did they say that they knew something happened to you too?

Jon Pause—no response to question.

JT Did they say "well Jonathon we know that Verl touched you too"?

Jon No.

JT Did they say that they knew that something happened to you too?

Jon No.

JT Um. What did they say? Did they tell him that you have to tell us anything that you know about Verl Hadley? You have to tell us something bad about Verl Hadley?

Jon Long pause—no response to question.

JT Did they?

Jon No.

JT O.K. What did they say? Can you tell me what they said?

Jon I don't remember what they said.

JT Oh. Did they say anything like, you have to tell us something bad about Verl so that we can do something about him?

Jon No.

JT O.K. Did Amadee Roy tell them about you?

Jon Yes.

JT He did?

Jon Yes.

JT How do you know? Did they say that? Did they say "we know that Verl touched you because Amadee Roy told us that?

Jon Pause—no response to question.

JT Is that what they said?

Jon Pause—no response to question.

JT Did they say that?

MS Did they say that to you:

Jon What:

MS What he is questioning you. What he is saying to you.

Jon No.

JT Well how do you know that Amadee Roy told them about you?

Jon He told me.

JT Amadee Roy told you? Is that right?

Jon Yea.

JT When was that? When did he tell you that?

Jon Long pause—no response to question.

JT Before or after you talked to them?

Jon Before.

JT So you knew that they were going to come to see you ha?

Jon Yea.

JT Did Amadee Roy tell you what to tell them?

Jon No.

JT How did Amadee Roy know that Verl had pinched you? Or did he know that?

Jon Because I told him.

JT You told Amadee Roy. What did you tell Amadee Roy? That Verl pinched you on the arm?

Jon Yea.

JT In the car?

Jon Yea.

JT And that Verl pinched you on the leg in side the gym?

Jon Yea.

JT And that Verl—you said that Verl was just playing with you or teasing with you?

Jon Yea.

JT Is that the truth? Have you told us the truth? Do you know what the truth is? The word truth?

Jon Yea.

JT What does the truth mean?

Jon Pause—no response to question.

JT Do you know what that word means?

Jon Pause—no response to question.

MS What does true mean?

Jon Pause—no response to question?

JT Is that a hard word to describe? Truth means that you say what really happened, and not make believe. Is that what the truth is?

Jon Pause—no response to question.

MS What does true mean?

Jon Really happen.

JT O.K. Is everything that you told us today the truth?

Jon Long pause—no response to question.

JT Do you understand my question?

Jon No.

JT Ha?

Jon No.

JT Oh. You talked to us today, right?

Jon Yea.

JT Did you tell us the truth today?

MS Did you tell the truth?

Jon Yes.

JT Yes. When you talked to the F.B.I., do you know who I mean now by the F.B.I., the people who came to talk to you?

Jon Yea.

JT Did you tell them the truth too, or make believe?

Jon Long pause—no response to question.

MS When the F.B.I. question you, what did you tell them?

Jon Make believe.

JT Make believe. What do you mean? Did you make something up for the F.B.I.?

Jon Pause—no response to question.

JT Did you make up a story for them?

Jon Yes.

JT How come? Were you scared when you talked to the F.B.I.?

MS Were you scared of them? Is that why?

Jon Yes.

MS Then say "yes".

Jon Yes.

JT Were you scared when you talked to them? Are you scared when you talk to me?

Jon No.

JT Why were you scared of the F.B.I.? Were they kind of mean to you or did they make you feel uncomfortable?

Jon Uncomfortable.

JT They made you feel uncomfortable?

Jon Yea.

JT How? Can you tell me how they did that?

Jon Pause—No response to question.

JT Did they try to be nice to you?

Jon Try to be nice to me.

JT They did try?

Jon Yea.

JT But you were scared of them.

Jon Yea.

JT How come?

Jon Pause—No response to question.

JT What did you tell them that was made up; that was make believe?

Jon Pause—No response to answer.

JT Did you tell them that Verl had done bad things to you?

Jon Yes.

JT Was that make believe? Is that the part that was make believe?

Jon Long pause—no response to question.

JT Can you answer that please? Was that make believe?

Jon Yes.

JT O.K. Does that mean that Verl really didn't do bad things to you?

Jon Long pause—no response to question.

JT He pinched you on the arm, I guess, right?

Jon Yea.

JT And he pinched you once in the gym on the leg, is that right?

Jon Yea.

JT Did he do anything else or is that all he ever did to you?

Jon Ever did to me.

JT Pardon.

Jon Ever did to me.

JT That's all he ever did?

Jon Yea.

JT He didn't do anything else?

Jon Yea.

JT Did you tell the F.B.I. that he had done other things?

Jon Pause—Yes.

JT You did. And was that make believe?

Jon Pause—Yes.

JT O.K. And did you make things up because you were afraid?

Jon Long pause—no answer to question.

JT Did you make them up because you were afraid of the F.B.I.?

Jon No.

JT Why did you make them up?

Jon Long pause—no response to question.

JT Can you tell me why you made up bad things about Verl Hadley?

Jon Yes.

JT Tell me why?

MS Tell him, he is asking why.

Jon No response to question.

MS Tell him the reason why.

JT You don't have to be afraid, we're not, we just want you to tell us why. We're not going to do anything to you. You won't be hurt here. O.K.? Its safe to tell us. Do you know what that means? Safe? That means nothing bad is going to happen to you. We just want you to tell us why, so that we understand. Does that make sense? Can you answer out loud, please?

Jon Yes.

JT O.K. Why did you make things up about Verl Hadley?

Jon Long pause—no response to question.

JT Can you tell me why Jonathan? Can you tell me why?

Jon Pause—no response to question.

JT Are you afraid to tell me why?

Jon Pause—no response to question.

JT Can you answer that please? Are you afraid to tell me why?

Jon No.

JT O.K. Why? Did Amadee Roy tell you to make up stories about Verl Hadley?

Jon Yea.

JT Do you know why?

Jon No.

JT Was it your idea or was it Amadee's idea?

Jon No answer to question.

JT To make up stories about Verl Hadley?

MS Whose idea was it, you or Amadee?

Jon Mine.

MS What is the word for "shy"?

JT Tell me in your own words what he was saying. It was your idea to make up stories about Verl Hadley?

Jon Yes.

JT Why?

Jon Pause—no response to question.

JT We're almost done. I just want to know why? Would you please tell me why?

MS What was the reason?

Jon Long Pause—no response to question.

JT Why? Is that a hard question to answer?

Jon No.

JT Could you answer it then please? Why did you make up stories about Verl Hadley? Did somebody tell you to?

Jon No.

JT O.K. Why did you do it then? Can you tell me that?

Jon No response to question.

JT Did the F.B.I. want you to make up stories about Verl Hadley?

Jon No.

JT Did Amadee Roy make up the stories?

Jon No.

JT You did. Did you make up the stories?

Jon Yea.

JT How come?

Jon Because.

JT Because why? Because what?

Jon No response to question.

JT Do you like Verl Hadley?

Jon No.

JT Why not?

Jon Because he pinched me.

JT Because he pinched you?

Jon Yea.

JT So you wanted to get Verl Hadley in trouble?

Jon No response to question.

JT Were you mad at Verl because he pinched you?

Jon Yes.

JT On the arm?

Jon Yea.

JT And on the leg, right?

Jon Yea.

JT So you made up some other stories about him?

Jon Yes.

JT Things that he didn't do, hah?

Jon Yea.

JT And you did that to get back at him?

Jon No response to question.

JT To get revenge? Do you know what revenge is?

Jon No.

JT O.K. Lets say when someone does something to you, you do something back to them.

Jon No.

JT Do you know what I mean by that?

Jon Yea.

JT That's revenge. Did you do that to get back at him for pinching you?

Jon No.

JT Why did you do it? Cause you don't like him?

Jon Yea.

JT O.K. What stories did you make up?

Jon No response to question.

JT Did you make up stories that he touched you in other places?

Jon No.

JT What stories did you make up?

Jon That Verl pinched me.

JT That he pinched you.

Jon On my leg.

JT Is that make believe?

JT Is that make believe?

Jon No response to question.

JT That's not the truth, hah?

Jon Pause—Yes.

JT It's make believe?

JT Alright, I've turned the tape over here, um Jonathan and I'm just about done. I'd like to be done, but I'd would like to find out one more thing. Um, why did you make up the stories about Verl Hadley? I guess because you didn't like him, is that right?

Jon Yea.

JT But what you told the F.B.I. is stories that you made up. Is that right?

Jon Long pause—no answer.

JT Right.

Jon Yes.

JT O.K. And so you didn't tell them the truth?

Jon No.

JT And the stories that you made up was about him touching you. Is that right?

Jon Yea.

JT O.K. I guess my—one last question is. Did Amadee Roy want you to do this or was it your idea all by yourself?

Jon Long pause—no answer to question.

JT Did Amadee Roy want you to do this.

Jon No.

JT Did he tell you to do it?

Jon No.

JT But he talked to you about Verl Hadley and the F.B.I. before the F.B.I. came to see you, didn't he?

Jon Yea.

JT Did you talk to him about making up a story about Verl?

Jon Yes.

JT O.K. Did he think that was a good thing for you to do?

Jon No.

JT Did he tell you to do it?

Jon Long pause—no.

JT You just did it all be yourself?

Jon Yea.

JT Because you didn't like Verl?

Jon Yea.

JT Did you make up any other stories about him?

Jon No.

JT But what you told the F.B.I. were made up stories then. Is that right?

Jon No answer.

JT Is that right?

Jon Yes.

JT O.K. Is there anything else you can tell me about any of this? Anything I haven't asked you, anything else we should know?

Jon No.

JT Did you make up stories about Verl Hadley to help Amadee Roy?

Jon Yes.

JT Oh. How was that going to help him?

Jon Long pause—No answer.

JT How was that going to help him?

Jon Long pause—no answer.

JT Was it going to help—do you know that Amadee Roy is made—has told stories about Verl Hadley too, hasn't he?

Jon Yes.

JT He's talked to the F.B.I. too, hah?

Jon Yes.

JT So you thought—did you think your story would help back him up kind of?

Jon Yes.

JT O.K. Did Amadee Roy tell you that he made up stories about Verl Hadley too?

Jon Yes.

JT So the stories that he told about Verl Hadley were made up too, is that right—were make believe?

Jon Made them up too.

JT They made them up too. I'm sorry I just didn't hear what you said. They were made up too?

Jon No.

JT The stories that Amadee Roy said about Verl Hadley were made up stories too, isn't that right?

Jon Yea.

JT O.K. In other words, his stories were make believe, right?

Jon Yea.

JT They were not the truth, were they?

Jon Yea.

JT They were the truth or they were not.

Jon Not.

JT Not the truth. Did Amadee Roy tell you that the stories he told about Verl Hadley were not the truth?

Jon Yea.

JT O.K. When did he tell you that?

Jon No answer.

JT When you and him talked about Verl Hadley?

Jon In 87.

JT In 87 he told you that?

Jon Yea.

JT O.K. Did he tell you why he made up stories about Verl Hadley?

Jon Yes.

JT Why?

Jon Long pause—no answer.

JT Did he like Verl Hadley?

Jon Yea.

JT Why did he make up stories about Verl Hadley, do you know?

Jon No answer.

JT Was he afraid when he talked to the F.B.I.?

Jon No.

JT Do you know why he made up stories, do you know why he made up stories or not?

Jon Not.

JT You do not know?

Jon Yea.

JT You don't know?

Jon Yea.

JT He just told you that he did?

Jon Yea.

JT And you made up stories to help him out?

Jon No.

JT To help out Amadee Roy?

Jon No.

JT I thought that's what you already told me? You thought it would help him out—to back him up, is that right?

Jon Yes.

JT Did you talk to any other kids besides Amadee Roy about Verl Hadley?

Jon No.

JT Is he the only one?

Jon Yea.

JT O.K. Now—so what you told the F.B.I. wasn't the truth. Is that right?

Jon Yea.

JT Have you told us the truth today?

Jon Yea.

JT Ah, did Verl Hadley ever pinch you on the arm?

Jon Yes.

JT Did he pinch you on the leg?

Jon Yes.

JT Did he do anything else?

Jon No.

JT That's all he ever did?

Jon Yea.

JT He never touched you, ah in your private areas, did he?

Jon No.

JT O.K. You know what private areas are don't you?

Jon Yea.

JT O.K. Like where you go to the bathroom, is that a private area?

Jon Yea.

JT He never touched you there did he?

Jon Yea.

JT He didn't touch you there right?

Jon Yea.

JT Yea what?

Jon No answer.

JT Yes he didn't touch you there. Is that what you mean?

Jon No.

JT What do you mean?

Jon No answer.

JT Is it the true that he didn't touch you anywhere else besides your arm and your leg. Is that true?

Jon Yes.

JT O.K. He didn't touch you in the private areas then? Right?

Jon Yea.

JT Am I right? Is my answer right?

Jon Yea.

JT O.K. Alright, I hope that's clear.

MS Yea it is.

JT Alright, is there anything else that you have to tell me about any of this?

Jon No.

JT Is there anything else I should know?

Jon No.

JT O.K. Ah are you sorry that you made up stories about Verl Hadley?

Jon Yea.

JT That was a bad thing to do, hah?

Jon Yea.

JT It's important to tell the truth, isn't it?

Jon Yea.

JT And ah so the F.B.I. people should know that you didn't tell the truth, hah?

Jon Yes.

JT It would be unfair for Verl Hadley to get in trouble because of things you made up wouldn't it be?

Jon No answer.

JT Isn't that true?

Jon No.

JT It would be unfair for him to get in trouble because of things—no it wouldn't—do you think it would be O.K. for that to happen, hah?

Jon No.

JT What do you think? Would that be fair or not fair?

Jon Not fair.

JT Not fair. O.K. Is there any other little kids that I could talk to—any other students here that I could talk to find out about this? Do you know anybody else that knows about this?

Jon No.

JT Did Amadee Roy talk to anybody else besides you about Verl Hadley?

Jon Pause—no.

JT O.K. You're the only person that you know of? O.K. Alright if there's anything else to tell about Verl Hadley or the F.B.I. or Amadee Roy—about any of this later—can you tell Marlene about it? If someting else comes up? Can you talk to Marlene about it so that she can get a hold of us so we'll know?

Jon No answer.

JT Is that O.K.?

Jon No answer.

JT Is that O.K.?

Jon Yes.

JT O.K. So if you have something else to say, can you tell Marlene about it? Marlene Singer.

Jon No answer.

MS At some other times, when you want to say something else would you tell me? That's what he's asking you.

Jon No.

MS You won't talk to me?

Jon I'll talk to you.

MS O.K.

JT What did he say?

MS He says that he will come and talk to me.

JT Alright so you'll go and talk to Marlene if there's something else to say?

Jon Yea.

JT O.K. Um. Alright and the whole time that you talked to me you weren't afraid of me or anything were you?

Jon No.

JT O.K. And you've told me the truth today?

Jon Yea.

JT Alright. Well thank you very much. I will go ahead and terminate this interview then and we'll turn off the tape recorder. You know that we tape recorded this today, don't you?

Jon Yes.

JT O.K. And you heard your voice on the tape recorder, didn't you?

Jon Yea.

JT O.K. Thank you very much. And the time is what?

DL Twenty after four.

JT Twenty after four and I guess we started about what time?

DL Three thirty.

JT Three thirty. Alright. Is that about right?

Jon Yea.

JT Alright. Thank you.

(Certificate of Transcriber Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Caption Omitted in Printing)

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE TO PERMIT EVIDENCE OF PRIOR BAD ACTS UNDER RULE 404(b)

Verl Hadley, by and through his attorney, submits the following supplemental memorandum in support of his "Response to Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts", which was previously filed with this Court on December 7, 1988. In addition, this supplemental memorandum will also specifically address the permissibility of allowing evidence of the past sexual relationship between Mr. Hadley and Cory Kay in order to show motive or intent within the framework of the superseding indictment.

It is expected that excludable delay under Title 18 U.S.C. Section 3161(h)(1)(F) may occur as a result of this motion or from an order based thereon.

MEMORANDUM

We believe that this Court's potential decision to allow evidence of a prior sexual relationship between Mr. Hadley and Cory Kay as it relates to the issues of intent or motive within the parameters of the superseding indictment.

On Friday, May 5, 1989, this Court heard brief testimony from Travis Yazzie and Cory Kay. Since Travis Yazzie denied any sexual relationship with Mr. Hadley, the only potential witness to offer evidence in such a relationship is Cory Kay. However, the defense will be in a position to call other witness this week which will show that the sexual relationship between Cory Kay

and Verl Hadley did not exist. The defense will be in a position to call former Sgt. Ray Laughter, Navajo Division of Public Safety, and Rueben Wiseman, former officer of the Navajo Dept. of Public Safety. Both officers investigated the previous charges instituted by Cory Kay against Mr. Hadley, as well as, Morris Singer and Sampson Yazzie. No prosecution took place as a result of the charges and Mr. Kay eventually refused to cooperate with any prosecutorial efforts. Ultimately, we do not believe that sufficient evidence exists to support the charges instituted by Cory Kay.

Second, we believe that any prior bad acts admitted under Rule 404(b) of the Federal Rules of Evidence must relate to specific conduct. Evidence of the prior sexual relationship between Cory Kay and Verl Hadley, without application to particular acts, is inappropriate. Rule 404(b) relates to prior bad "acts", not the existence of a prior relationship. Moreover, it is impossible for Mr. Hadley to defend against broad evidenc of undefined prior bad acts. Finally, as previously stated, Mr. Hadley does not contest the issue of "intent" or "motive" in this case. Indeed, Mr. Hadley's attorney has previously stated that he will stipulate that the requisite intent exist in this case. In other words, Mr. Hadley is willing to affirmatively act to remove the issue of intent from this case. As a result, no prior bad act evidence should be admitted under Rule 404(b) of the Federal Rules of Evidence.

Of course, as previously articulated by counsel for Mr. Hadley, we believe that any evidence of sexual conduct between Mr. Hadley and Cory Kay is more prejudicial than probative under the balancing test of Rule 403 of the Federal Rules of Evidence.

In order to simplify the issues that are pending before this Court and to ensure that Mr. Hadley's position in this matter is not mistaken, Mr. Hadley offers the following admissions or stipulation, in this case, as long

as evidence of prior bad acts under Rule 404(b) are not admitted by the trial court:

COUNT VII AND VIII:

Count VII and VIII of the superseding indictment charge Mr. Hadley with aggravated sexual abuse under Title 18 U.S.C. Section 2241(a)(1). In essence, Mr. Hadley is charged with knowingy causing another person to engage in a sexual act by using force against the other person, namely Amadee Roy. An act is done knowingly if it is done voluntarily and intentionally, but not because of mistake or accident or other innocent reason. If the jury finds that the acts alleged within counts VII and VIII of the superseding indictment occurred, then Mr. Hadley is willing to stipulate or concede or admit that none of the acts were done because of mistake or accident or other innocent reason. The issue of intent or motive does not exist.

COUNT IX AND XI:

Counts IX and XI of the superseding indictment charge Mr. Hadley with abusive sexual conduct under Title 18 U.S.C. Section 2244(a)(3). Count IX simply charges Mr. Hadley with engaging in "sexual contact" with Amadee Roy, who was between the ages of 12 and 16 at the time that the touching occurred. Count XI essentially charges Mr. Hadley with engaging in sexual contact with Fernando Yazzie, who had not yet attained the age of twelve years. As long as the jury in this case is convinced that "sexual contact" occurred between Mr. Hadley and the two minor children mentioned in counts IX and XI of the superseding indictment, then Mr. Hadley is willing to concede, stipulate or admit that the act occurred knowingly. In other words, Mr. Hadley is willing to concede that the act took place without mistake, accident or other innocent reason. Mr. Hadley is willing to admit, concede or stipulate that—if the sexual contact occurred—then it occurred with intent to arouse

or gratify the sexual desire of any person. See Title 18 U.S.C. Section 2245(3).

COUNT X:

Count X of the superseding indictment charges Mr. Hadley with molestation of a child under Arizona law, A.R.S. Section 13-1410, by directly touching the private parts of Jonathan Tsosie, an Indian child under the age of fifteen years, during October, 1986. Count X essentially charges Mr. Hadley with directly or indirectly touching the private parts of Jonathan Tsosie in a "knowingly" manner. Under Arizona law, the term "knowingly" requires that Mr. Hadley must have been aware of or believed that he was completing the touching required by the statute. See A.R.S. Section 13-105(6). As long as the jury finds that the sexual molestation occurred as charged in the indictment beyond a reasonable doubt, then Mr. Hadley is willing to admit, concede or stipulate that the act took place "knowingly" as defined by Arizona law.

The Second Circuit has now held that evidence of prior bad acts is not admissible under Rule 404(b) if the defendant affirmatively acts to remove the issue of intent from the case. *United States v. Figueroa*, 618 F.2d 934, 941-42 (2nd Cir. 1980); *United States v. Manafzadeh*, 592 F.2d 81, 87 (2nd Cir. 1979); *United States v. O'Connor*, 580 F.2d 38, 41 (2nd Cir. 1978); *United States v. Williams*, 577 F.2d 188 (2nd Cir. 1978), cert. denied, 439 U.S. 868 (1978). Other courts have held that evidence of prior misconduct under Rule 404(b) cannot be admitted unless specific intent is actually a disputed issue in the case. Mr. Hadley's position affirmatively shows that intent is not a disputed issue in the case. Moreover, proof of the acts charged in this case tend to infer the existence of intent, thereby removing the need for prior misconduct evidence. *United States v. Shackleford*, 738 F.2d 776, 781 (7th Cir. 1984).

Although the Ninth Circuit has not yet established a clear rule that intent may be affirmatively removed from the case by the defendant, its position supports the preclusion of other—crime evidence in this case in light of Mr. Hadley's admissions or proffered stipulation. See *United States v. McKoy*, 771 F.2d 1207, 1214 (9th Cir. 1985). Also see, *United States v. Drainman*, 784 F.2d 248, 254 (7th Cir. 1986); *United States v. Chaimson*, 760 F.2d 798, 805-06 (7th Cir. 1985).

In light of the fact that three charges have already been combined during the trial of this case, the admissibility of other prior bad acts in a case of this type will clearly cause substantial prejudice. The prejudice is unnecessary in light of Mr. Hadley's admissions and stipulation to remove the issue of intent from the case. The issue of intent is not central to the case in any event. The only genuine issue in this case is whether or not the acts occurred. Mr. Hadley's defense that the acts did not occur, but that the minor children were persuaded to make accusations against Mr. Hadley because of aggressive interviewing techniques on the part of the F.B.I. and other law enforcement officials. Please also see Mr. Hadley's previous memorandm entitled "Response to Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts."

Respectfully submitted this — day of May, 1989.

/s/ _____

JOHN TREBON
Attorney for Verl Hadley

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Caption Omitted in Printing)

NOTICE OF APPEAL

Verl Hadley, by and through his counsel, John Trebon, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment, findings, and sentence entered on August 21, 1989.

Respectfully submitted this 24 day of August, 1989.

/s/ John Trebon
JOHN TREBON
Counsel for Verl Hadley

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 89-10428

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
VERL HADLEY,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona

Argued and Submitted Aug. 16, 1990
Decided Nov. 14, 1990

Before WALLACE, ALARCON and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Hadley appeals his convictions for aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(1) and abusive sexual contact in violation of 18 U.S.C. § 2244(a)(2). He argues that the district court abused its discretion by improperly admitting evidence of prior acts of sexual abuse and explanatory expert witness testimony. He contends that insufficient evidence exists to convict him on one of the three counts on which he was found guilty.

Finally, Hadley challenges his sentence, on the ground that it was not imposed in accordance with the Sentencing Guidelines. The district court exercised jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

Hadley is a former elementary school teacher who taught for eleven years at the Bureau of Indian Affairs School (BIA school) on the Navajo Indian Reservation at Chilchinbeto, Arizona. Complaints of sexual molestation led to an investigation of Hadley, which resulted in an indictment charging him with eleven counts of sexual abuse involving five minor victims. The district court granted Hadley's motion to sever, and the subsequent trial dealt only with counts seven through eleven of the superseding indictment. Counts seven through nine charged Hadley with aggravated sexual abuse, attempted aggravated sexual abuse, and abusive sexual contact. These charges arose from allegations that Hadley had committed forcible anal intercourse and other acts of sexual abuse against Roy, a student at the BIA school.

Roy testified at trial to three-separate incidents of sexual molestation by Hadley in late 1987 and early 1988. In addition, over Hadley's objection, the district court allowed other government witnesses to testify that Hadley had forcibly sodomized them when they were minors. The government also presented the expert testimony of Dr. Rosenzweig, a child psychiatrist, who testified on the issue of general behavior characteristics exhibited by victims of child sexual abuse.

The jury found Hadley guilty of the three crimes perpetuated against Roy. Hadley was acquitted on the remaining two counts, which involved less serious allegations by two other students. The district judge sentenced Hadley to 30 years' imprisonment for his conviction of aggravated sexual abuse as charged in count seven, and

to 108 months for the convictions on counts eight and nine. The judge ordered that the sentences for counts eight and nine be served consecutively to the sentence for count seven, and imposed fines totaling $20,000.

II

Hadley first argues that the district court should not have admitted the prior bad act testimony of witnesses who testified that Hadley had sodomized and sexually abused them when they were children. We review a district court's decision to admit evidence of prior bad acts under Fed.R.Evid. 404(b) only for an abuse of discretion. *United States v. Brown*, 873 F.2d 1265, 1267 (9th Cir.1989). Indeed, we have held that Rule 404(b) is an "inclusionary rule," under which evidence is inadmissible "only when it proves nothing but the defendant's criminal propensities." *United States v. Diggs*, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed.2d 387 (1981). Therefore, the district judge is "accorded wide discretion in deciding whether to admit such evidence." *Id.*

Rule 404(b) allows the introduction of prior bad acts "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). We have held that evidence is admissible under Rule 404(b) if: (1) sufficient proof exists for the jury to find that the defendant committed the prior act; (2) the prior act was not too remote in time; and (3) the prior act is introduced to prove a material issue in the case. *United States v. Ross*, 886 F.2d 264, 267 (9th Cir.1989) (*Ross*), *cert. denied*, —— U.S. ——, 110 S.Ct. 1818, 108 L.Ed.2d 947 (1990); *United States v. Spillone*, 879 F.2d 514, 518-20 (9th Cir.1989) (*Spillone*), *cert. denied*, —— U.S. ——, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990). In addition, if used to prove intent, the prior act must be similar to the offense charged. *Id.* at 519.

First, we hold that sufficient evidence of the prior bad acts existed for a jury to "reasonably conclude that the act[s] occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988). The witnesses testified in detail about the sexual abuse inflicted upon them by Hadley. This testimony clearly amounted to more than the "unsubstantiated innuendo" that the Supreme Court warned against in *Huddleston*. *Id.* Thus, the jury reasonably could have concluded that Hadley previously sodomized and abused these witnesses.

Second, one witness testified to a regular pattern of sodomy and sexual molestation that began when the boy was ten years old, and lasted until 1977 when he was fifteen. Hadley argues that this act is too remote in time to justify admissibility. We have previously declined to adopt an inflexible rule regarding remoteness in the context of Rule 404(b). *See Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 514. Hadley stopped sexually abusing this witness ten year prior to the abuse for which he was convicted. The district judge found that "there certainly is a similarity in space and practice" between the prior act and the offense charged. The similarity of the prior act to the offense charged outweighs concerns regarding its remoteness. Thus, we hold that the district judge did not abuse his discretion in admitting this testimony. *Cf. Ross*, 886 F.2d at 267 (admitting evidence of a prior act that occurred 13 years beforehand based on the similarity of the offenses); *Spillone*, 879 F.2d at 519 (admitting evidence of a conviction more than ten years old).

Third, Hadley contends that the prior bad act evidence was not introduced to prove a material element in the case. Hadley was charged in count nine with abusive sexual contact. To demonstrate sexual contact, the government had to prove that Hadley acted "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify

the sexual desire of any person." 18 U.S.C. § 2245(3). The district judge found that the prior acts "have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature." In addition, the evidence helped to demonstrate specific intent, the proof of which was required in all three counts. On this basis, it was properly admitted. Of course, as pointed out above, if the prior acts are used to prove intent, those acts must be similar to the offense charged. The district judge found that they were, and we do not disagree. In all cases, Hadley isolated his student victims and performed acts of sexual gratification upon them, often including anal intercourse. We conclude that this similarity was sufficient to allow the admission of the prior acts as evidence of intent.

Hadley argues that *United States v. Powell*, 587 F.2d 443 (9th Cir.1978), requires a different result. Powell was convicted of conspiracy to possess marijuana with intent to distribute. *Id.* at 445. At trial the government offered proof of two prior convictions on three theories of relevance: intent, plan, and motive. *Id.* at 447. The district court refused to admit either of the prior convictions on the theories of intent or plan, but admitted one of the prior convictions as relevant to motive. *Id.* at 447-48. We reversed and remanded for a new trial. *Id.* at 449.

Hadley urges reliance on a single sentence in *Powell:* "When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b)." *Id.* at 448. At trial, Hadley's defense was a denial of participation in the acts of which he was convicted: he offered not to argue the issue of intent. Thus, he contends, *Powell* precludes the government from proving intent with evidence of prior bad acts.

This is not the holding of *Powell*. Indeed, nothing in *Powell* on the issue of intent could have been its holding, because the district court's ruling on the issue was not challenged on appeal. Powell appealed the district court's decision to admit the prior conviction as relevant

to motive. The district court's ruling on intent was uncontested on appeal. Powell did not challenge the district court's refusal to admit the evidence on the theory of intent, as this ruling was favorable to him. Significantly, the government did not cross-appeal. Thus, the statement relied on by Hadley was nonbinding dicta which cannot control the outcome in a subsequent case.

Hadley's argument can be read to suggest we adopt the *Powell* dicta as persuasive authority. The statement, as interpreted by Hadley, goes too far. The government must prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970). This burden is not relieved by a defendant's promise to forgo argument on an issue. *See Spillone*, 879 F.2d at 518 (evidence of prior conviction properly admitted on issue of intent despite defendant's promise not to argue it). Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime. Hadley's choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means. Rule 404(b) permits the government to prove intent by evidence of prior bad acts, and we have already held that admission of such a proof in this case was not an abuse of discretion under the rule.

We must also investigate, however, whether the prior bad acts should have been executed because their probative value was substantially outweighed by the danger of unfair prejudice. Fed.R.Evid. 403; *Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 520. The evidence was highly probative on the question of intent, especially in light of the similarity found between the prior acts and the offense charged. The evidence was obviously prejudicial, but its prejudicial effect was limited by the instruction given by the district court. *United States v. Boise*, 916 F.2d 497, 502 n. 13 (9th Cir.1990) (as amended); *Spillone*, 879 F.2d at 520. The court properly instructed

the jurors that they could use the prior bad acts evidence to establish intent and motive only if they first found that the other evidence established beyond a reasonable doubt that Hadley committed the acts charged. The possibility of unfair prejudice did not substantially outweigh the probative value of the evidence.

Thus, we conclude that the district court did not abuse its discretion in admitting the evidence of Hadley's prior acts of sexual abuse.

III

Hadley next contends that the district court improperly admitted the expert testimony of Dr. Rosenzweig, a child psychiatrist who testified for the government. We review the district court's decision to admit expert psychiatric testimony for abuse of discretion. *United States v. Binder*, 769 F.2d 595, 601 (9th Cir.1985).

Hadley first argues that the expert testimony should have been excluded because it improperly bolstered the testimony of the minor victims. In support of this argument, he cites our decision in *Binder*, where we held that the district court erroneously admitted expert testimony that addressed the credibility of the abused children. In that case, however, "the experts testified that [those] particular children in [that] particular case *could be believed*." *Id.* at 602 (emphasis added). Dr. Rosenzweig, on the other hand, testified about general behavior characteristics that may be exhibited in children who have been sexually abused, and the testimony was therefore limited "to a discussion of a class of victims generally." *Id.* Because this general testimony merely "assist[ed] the trier of fact in understanding the evidence," *id.*, Dr. Rosenzweig did not improperly bolster the children's testimony.

Hadley next contends that Dr. Rosenzweig's testimony failed to quality under the test adopted in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), and thus should not have been admitted. The *Frye* test allows admission of

"[e]vidence based on a novel scientific technique" only if the technique is generally accepted as reliable in the relevant scientific community. *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir.1985) (*Solomon*). We have held, for example, that an expert's conclusions on sexual abuse based on a child's behavior with anatomically correct dolls must pass the *Frye* test. *See United States v. Gillespie*, 852 F.2d 475, 480-81 (9th Cir.1988). The district court found that Dr. Rosenzweig's testimony was not based on any "novel scientific technique," *Solomon*, 753 F.2d at 1526, and thus need not qualify under *Frye*. Because Dr. Rosenzweig merely testified to general behavioral characteristics based upon his professional experience, and did not employ any special techniques or models, the district court correctly concluded that the *Frye* test was not applicable.

Finally, Hadley argues that Dr. Rosenzweig's testimony was more prejudicial than probative, and therefore violated Fed.R.Evid. 403. The testimony helped to explain the testimony of the abused children, and therefore rendered " 'appreciable help' " to the jury. *Solomon*, 753 F.2d at 1525, *quoting United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885, 969, 100 S.Ct. 179, 460, 62 L.Ed.2d 116, 383 (1979). Hadley points to no specific prejudicial effect that substantially outweighs this probative value, and therefore, discretion was not abused in the admission of the expert testimony.

IV

We next review Hadley's contention that there was insufficient evidence to convict him of count eight, attempted aggravated sexual abuse of Roy. In reviewing a claim of insufficient evidence, we must determine whether, viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the defendant[] guilty beyond a reasonable doubt." *United States v. Murray*, 751 F.2d 1528, 1534 (9th Cir.), *cert. denied*, 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 335 (1985).

The facts relating to count eight indicate that in November 1987, Hadley gave Roy a ride home from a swimming pool and persuaded Roy to sit on his lap and drive the vehicle. Upon feeling Hadley's penis grow erect beneath him, Roy got off his lap and returned to the passenger seat. Only one month earlier, Hadley had used the same modus operandi to penetrate Roy's anal cavity, which led to his conviction on count seven for aggravated sexual abuse.

We have held that "attempt includes an element of specific intent even if the crime attempted does not." *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990). Thus, to justify a conviction on count eight, the government must have proven beyond a reasonable doubt that Hadley intended to engage in a prohibited sexual act with Roy in November 1987. *See* 18 U.S.C. § 2245 (2)-(3) (defining "sexual act" and "sexual contact"). In addition, to constitute an attempt, there must be more than mere preparation to commit a crime. "There must be 'some appreciable fragment of the crime' in progress." *United States v. Runco*, 873 F.2d 1230, 1232 (9th Cir. 1989) (*Runco*), *quoting United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir.1987).

The government introduced evidence that: (1) Hadley asked Roy to sit on his lap while Hadley was driving; (2) Hadley tried to get Roy to remove his pants; and (3) Roy felt Hadley getting an erection while Roy was sitting on Hadley's lap. In light of this evidence, together with the similar sexual abuse that occurred a month before, a rational jury could have found beyond a reasonable doubt that Hadley intended to engage in a sexual act with Roy. Furthermore, a rational jury could have concluded that Hadley's actions constituted sufficient steps "in the course of conduct planned to culminate in the commission of the crime." *Runco*, 873 F.2d at 1232. Thus, there was sufficient evidence to support Hadley's conviction on count eight.

V

Finally, Hadley contends that the district court erred by imposing a sentence not in accordance with the Sentencing Guidelines for his conviction on count seven. The district court did not apply the Sentencing Guidelines in imposing a 30-year sentence on that conviction. The court did follow the Sentencing Guidelines when it sentenced Hadley to nine years in prison on counts eight and nine.

Hadley's contention is without merit. We have held that the Sentencing Guidelines do not apply to conduct that occurred before November 1, 1987. *United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 2168, 109 L.Ed.2d 497 (1990). There is no dispute that the conduct underlying the count seven conviction occurred in October 1987, prior to the effective date of the Sentencing Guidelines. Thus, the district court did not err when it declined to apply the guidelines to count seven.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-6646

VERL HADLEY,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 2, 1992

MAY 12 1992
OFFICE OF THE CLERK

No. 91-6646

In The

Supreme Court of the United States

October Term, 1991

VERL HADLEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To
United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. If "intent" is not a genuine or disputed issue at trial, should the government be allowed to admit overwhelming amounts of uncharged misconduct evidence under the ruse of proving a technical issue of "intent" required by federal statute?

2. Should a trial court consider the defendant's offer to stipulate or enter into a judicial admission on the issue of "intent" as one factor in the balancing process required under Rule 403 of the Federal Rules of Evidence?

3. Is it appropriate for federal Courts to adopt a *per se* rule of admissibility in favor of prior bad acts whenever a "specific intent" crime is charged notwithstanding the provisions of Rule 403?

4. Did the trial court and the Court of Appeals correctly apply Rule 403 in Mr. Hadley's case relating to the admission of prior bad acts?

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United States v. Kahaner, 317 F. 2d 459 (2nd Cir. 1963), *cert. denied*, 375 U.S. 836 (1963) 38

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G. Allport, *Personality – A Psychological Interpretation* 521 (1937) 24

G. Allport, *Traits Revisited*, 21 Am. Psychologist 1 (1966) 24

Case Comment, 2 Fla. St. U.L. Rev. 197 (1974) 25

Cowen & Carter, *Essays on the Law of Evidence* (1956) 30

Curtin, *Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant – Witness*, 45 Albany L. Rev. 1099 (1981) 42

Eichorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 Law and Contemp. Prob. 341 (1989) 42

Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 Univ. of Calif., Davis 59 (1984) .37, 38

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Green and Loftus, *When Crimes are Joined at Trial*, 9 Law and Human Behav. 193 (1985) 42

Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 Ariz. L. Rev. 212 (1965) 25

Griswold, *The Long View*, 51 A.B.A. Journal 1017 (1965) 42

Hearings before Special Committee on Investigation of the Select Committee for Indian Affairs, Feb. 21, 22, 23, 27, 1989 (SHRG-101-126, Part 3) 2

Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. Law Rev. 604 (1989) 24, 44, 48

Imwenkerlied, *Uncharged Misconduct Evidence* (1984 and 1992 Supp.) ..... *passim*

Imwenkerlied, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 Emory L. J. 341 (1991) 43

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Kyser, *Developments in Evidence of Other Crimes*, 7 J. of Law Reform 535 36

Ladd *Credibility Test – Current Trends*, 89 U. Pa. L. Rev. 166 (1941) 40

Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213 (1986) 28, 31, 48

TABLE OF AUTHORITIES – Continued

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Lawson, *Credibility and Character: A Different Look at an Interminable Problem* (1975), 50 Notre Dame Lawyer 758 ..... 25, 37, 38

London School of Economics Jury Project, *Juries and the Rules of Evidence*, 1973 Crim. L. Rev. (Eng.) 208 36

C. McCormick *On Evidence* (3rd Ed. E. Cleary 1984 and 1987 Supp.) 31, 49

Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 And The Impact of Recent Psychological Studies*, 31 U.C.L.A. Law Review 1003 (1984) 24, 37, 38

W. Mischel, *Personality and Assessment* (1968) 24

Vol. 10, *Moore's Federal Practice*, Sec. 403.02[3] (1988) 22

Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L. J. 763 (1961) 30, 36, 41

D. Peterson, *The Clinical Study of Social Behavior* (1968) 24

Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 Cin. L. Rev. 713 (1981) [Reed I] 22, 23, 24, 25

Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 Cin. L. Rev. 299 (1982) [Reed II] 30

Reed, *Admission of Other Criminal Act Evidence after Adoption of the Federal Rules of Evidence*, 53 Cincinnati L. Rev. 113 (1984) [Reed III] 25, 35, 36

TABLE OF AUTHORITIES – Continued

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Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev. 297 (1982) 35

Shotwell, *Exclusion of Prior Acquittals: An Attack on the "Prosecurtor's Delight"*, 21 U.C.L.A. L. Rev. 892 (1974) 41

Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan L. Rev. 411 (1972) 24, 38

Slough and Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325 (1956) 24

Snively, *Time for Change: Evidentiary Safeguards Needed in Trials for Sex Offenses*, 11 Ind. L. Rev. 895 (1978) 36

James Sully's *The Human Mind* 24

Summers, *Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions*, 36 Tenn. L. Rev. 515 (1969) 28

Tanford, Penrod, and Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behav. 319 (1985) 42

P. Vernon, *Personality Assessment: A Critical Survey* (1964) 24

Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 Journal Crim. Law, Crimin. and Pol. Sci. 15 (1962) 43

J. Weinstein & M. Berger, *Weinstein's Evidence*, (1985) 25, 33, 34, 39

Wigmore on Evidence, Sec. 193-94, 216 (1904) 24, 31

TABLE OF AUTHORITIES – Continued

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Wigmore on Evidence, Sec. 302 (3d ed. 1980)..... 29

Wigmore, *Principles of Judicial Proof* (1913)..... 24

Wissler and Saks, *On the Inefficacy of Limiting Instructions*, 9 Law and Human Behav. 37 (1985) 42

Wright & Graham, *Federal Practice and Procedure: Evidence* (1978) 28-29, 30, 44

OPINIONS BELOW

The judgment and sentence of the United States District Court for the District of Arizona was issued on August 21, 1989 (C.R. 160).[1] The opinion of the United States Court of Appeals for the Ninth Circuit dated November 14, 1990, is reported at 918 F. 2d 848 (9th Cir. 1990). (J.A. 173-82).

JURISDICTION

On September 9, 1990, the Court of Appeals for the Ninth Circuit issued an order denying Mr. Hadley's petition for rehearing and rejecting his suggestion for rehearing *en banc*. The jurisdiction of this Court was timely invoked under Title 28 U.S.C. Sec. 1254(1), 2101(b), and Rule 13.1 of the Rules of the Supreme Court of the United States. The petition for a writ of *certiorari* was mailed on December 6, 1991, and received by this Court on Monday, December 9, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant statutes are set forth in appendix to this brief:

Sixth Amendment to the United States Constitution

Rules 401, 402, 403, 404, 405, and 608 of the Federal Rules of Evidence

Title 18 U.S.C. Sections 2241 through 2245 [Sexual Abuse Act of 1986]

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[1] Documents from the Clerk of the United States District Court for the District of Arizona will be designated "C.R.", followed by the appropriate docket control number. References to the Joint Appendix will be made by using the abbreviation "J.A.", followed by the pertinent page number(s). Reference to the transcript of the proceedings before the District Court will use the abbreviation "R.T.", followed by the appropriate volume and page numbers.

In order to comply with the spirit of the confidentiality provision of the Crime Control Act of 1990, Title 18 U.S.C. Sec. 3509(d), the names of the minor children have been referred to by their first name and the first initial of their last name only.

STATEMENT OF CASE

On March 31, 1988, Verl Hadley was arrested at his home near Kayenta, Arizona, which is located within the boundaries of the Navajo Indian Reservation. On April 27, 1988, Mr. Hadley was charged by indictment with eight counts of sexual misconduct regarding minor children. Then, on December 21, 1988, a superseding indictment was issued charging Mr. Hadley with eleven counts of sexual misconduct involving five minor children. (J.A. 3-7).

Mr. Hadley was a grade school teacher at a B.I.A. school in Chilchinbeto, Arizona, at the time of his arrest. Mr. Hadley's name surfaced while the F.B.I. was investigating another teacher on the Navajo Indian Reservation. Indeed, a rash of cases involving sexual misconduct on the part of B.I.A. teachers in Arizona have erupted over the past few years. Congressional hearings were held in Arizona during the pendency of Mr. Hadley's case concerning the perceived epidemic of sexual misconduct on the part of B.I.A. employees. See Hearings before Special Committee on Investigation of the Select Committee for Indian Affairs, Feb. 21, 22, 23, 27, 1989 (SHRG-101-126, Part 3).

Although Judge Carroll ruled that counts VII through XI of the superseding indictment would be severed – for purposes of trial – from counts I through VI, Judge Carroll also ruled that evidence relating to the first six counts of the superseding indictment would be admissible at the first trial as prior bad acts under Rule 404(b) of the Federal Rules of Evidence. (R.T., April 27, 1989, p. 8).

As a result, the first trial relating to Amadee R., Jonathan T., and Fernando Y. encompassed evidence relating to nearly all of the counts within the superseding indictment. In addition, Judge Carroll admitted evidence of other bad acts dating back seventeen years in time.

On May 18, 1989, the jury returned a verdict of guilty against Mr. Hadley on counts VII through IX (Amadee R.), and a verdict of not guilty on counts X and XI (Jonathan T. and Fernando Y.) of the superseding indictment. (R.T., Vol. 9,

p. 1820). Judge Carroll sentenced Mr. Hadley under the federal sentencing guidelines to imprisonment for a term of 108 months on counts VIII and IX, to be followed by a period of supervised release for a period of 60 months, as well as the imposition of a fine in the amount of $10,000.00. On count VII, which did not fall under the new sentencing guidelines, Judge Carroll sentenced Mr. Hadley to imprisonment for a term of 30 years pursuant to Title 18 U.S.C. Sec. 4205(a). An additional fine of $10,000.00 was imposed. Judge Carroll ordered that both sentences be served consecutively. (R.T., Post Trial Motions and Sentencing, pp. 38-41).

A. STATEMENT OF FACTS AND DISTRICT COURT PROCEEDINGS

1. Fernando Y. (Count XI) and Jonathan T. (Count X)

The government began its case by focusing upon count XI of the superseding indictment. Count XI charged Mr. Hadley with abusive sexual contact with Fernando Y., an Indian child under twelve years of age, on or about May, 1988. Count XI fails to specify the particular contact that was supposedly committed by Mr. Hadley. See Title 18 U.S.C. Sec. 2244(a)(1).

On direct examination, coached by leading questions, Fernando Y. testified that Verl Hadley touched his penis in one of the restrooms at the Chilchinbeto Day School. (R.T., Vol. 2, pp. 394-91). On cross examination, Fernando Y. revealed that Verl Hadley had never been one of his teachers. Mr. Hadley's classroom was in a separate building from Fernando's classroom. (R.T., Vol. 2, pp. 393-98). Fernando Y. testified that the touching incident occurred one week before his birthday, which falls on May 14th. Therefore, the alleged incident occurred on or about May 7, 1988.

Fernando Y. testified that the incident occurred on a day when Mr. Hadley was teaching school. (R.T., Vol. 2, pp. 398-400). Fernando recalled that Mr. Hadley had taught school for a series of days both before and after the alleged incident during May, 1988. Fernando Y. testified that he

reported the touching incident to the principal of the school, Joe Hardy, the same day that it occurred. (R.T., Vol. 2, pp. 408-09).

Fernando Y. confirmed that F.B.I. agents told him that Verl Hadley had touched the private parts of other boys. (R.T., Vol. 2, pp. 404-05). Although he did not know Verl Hadley very well, he testified that he did not like Verl Hadley because he looks like a queer and walks like a girl. In the end, Fernando Y. admitted that he was testifying against Verl Hadley because he didn't like him. (R.T., Vol. 2, pp. 414-418).

Fortunately, other witnesses established the fact that Mr. Hadley had been reassigned from the Chilchinbeto Day School to the B.I.A. office in Tuba City, Arizona, during February, 1988. (R.T., Vol. 6, pp. 1061-64). Although Mr. Hadley was in the school in order to meet with Mr. Hardy for about thirty minutes on May 19, 1988, at approximately 4:30 p.m., he was not in the school when classes were in session or at any other time during May, 1988. (R.T., Vol. 6, pp. 1208-11, 1221-22; Vol. 7, pp. 1265-69).

Next, the government presented the testimony of Jonathan T. Verl Hadley was charged with child molestation against Jonathan T. under state law through the Assimilative Crimes Act. See Title 18 U.S.C. Sec. 1152 and A.R.S. Sec. 13-1410. Unfortunately, count X of the superseding indictment simply states that Verl Hadley directly touched the private parts of Jonathan T. during October, 1986. Although Jonathan T. was interviewed by defense counsel prior to trial, he failed to mention the specific act relied upon by the government. The act was not disclosed to Mr. Hadley or his attorney until Jonathan T.'s testimony was admitted at trial.

Briefly, the government contended that Verl Hadley had provided Jonathan T. with a pair of sweatpants to replace a pair of torn pants that he was wearing at school. Aided by leading questions, Jonathon T. testified that Verl Hadley touched his "dick" in a storage room while the change of clothing was being completed. (R.T., Vol. 2, pp. 428-37).

The allegations involving Jonathan T. were developed and supplemented by a teacher at the Chilchinbeto Day

School, namely Thomas Edward Klanchnik. He testified that Verl Hadley had taken Jonathan T. out of his class without permission. He saw Jonathan T. return from the storage room with a "sheepish" look on his face. After the investigation of Verl Hadley commenced several years later, Mr. Klanchnik recalled the incident and brought it to the attention of the F.B.I. Mr. Klanchnik insisted that the tear in Jonathan's pants did not warrant a change of clothes. According to Mr. Klanchnik, none of the other students in the classroom noticed the tear. (R.T., Vol. 3, pp. 492-500).

On direct examination, however, Jonathan T. testified that he saw a teacher's aid, George Charley, in the hallway after he changed his pants. He did not recall seeing Mr. Klanchnik. (R.T., Vol. 3, p. 436). Contrary to Mr. Klanchnik, Jonathan also testified that other students at the school had, in fact, teased him about the tear in his blue jeans.

Prior to trial, Jonathan T. was interviewed by defense counsel, which resulted in a tape recorded statement. The tape recorded statement was played to the jury and the transcript of the statement was admitted into evidence during trial as Exhibit "I". (Def. Ex. I, R.T. Vol. 8, p. 1567, J.A. 134-66). Jonathan T. confirmed that the tape recorded statement was true and correct. He also confirmed that Verl Hadley had never touched him in any of his private parts. (R.T., Vol. 2, pp. 447-49; Def. Ex. "I", J.A. 162-63).

George Charley testified that Mr. Hadley accompanied Jonathan T. to the storage room in order to obtain some sweatpants. He was with Jonathan T. for approximately "two minutes". (R.T., Vol. 7, p. 1253). However, Mr. Charley testified that Jonathan T. took the sweatpants into the boy's bathroom and changed clothes by himself. Mr. Hadley did not go into the bathroom with Jonathan T. (R.T., Vol. 7, p. 1254).

Jonathan T.'s name did not come to the attention of the F.B.I. until he lived with Amadee R. and his family. Jonathan T. admitted that the allegations against Verl Hadley were "make believe" and the stories were "not fair". (Def. Ex. "I", J.A. 151-52, 164). Jonathan T. admitted that he made up a story against Verl Hadley for and was afraid of the F.B.I.

Jonathan T. also admitted that Amadee R. had told him to make up stories about Verl Hadley. (Def. Ex "I", J.A. 159-60). He made up stories about Verl Hadley in order to help Amadee R., who told him that he made up stories about Verl Hadley as well (Def. Ex. "I", J.A. 159-61). As related by Jonathan T., Amadee R. "made them up too."

2. Amadee R. (Counts VII, VIII, AND IX)

The charges leveled by Amadee R. against Verl Hadley are contained in Counts VII, VIII, and IX of the superseding indictment. Count VII charges Mr. Hadley with causing or attempting to cause Amadee R. to engage in anal intercourse by force "on or about October, 1987." Count VIII similarly charges Mr. Hadley with attempted anal intercourse by force on or about November, 1987. See Title 18 U.S.C. Sec. 2241(a)(1). Count IX charges Mr. Hadley with intentionally touching the genitalia of Amadee R. on or about February 1, 1988. See Title 18 U.S.C. Sec. 2244(a)(2).

As revealed by Amadee R., his testimony against Verl Hadley was well rehearsed. Amadee R. testified that F.B.I. Agent John Schafer had told him the content of his expected testimony. (R.T., Vol. 3, p. 573). For instance, when Amadee R. was asked "Do you remember something happening between you and Mr. Hadley?" and "When did that first happen . . . ?", Amadee R. responded by citing "October nineteen – 1987 – wait, yeah." (R.T., Vol. 3, p. 540).

On direct examination, Amadee R. testified that Verl Hadley had picked him up from his home in the White Mesa area near Chilchinbeto and driven him to Kayenta, Arizona, in order to attend a swimming session with other students. After swimming, Verl Hadley gave Amadee R. a ride home. According to Amadee R., Verl Hadley told him to sit on his lap and steer the car during the ride home. Amadee R. testified that Verl Hadley then inserted his "dick in my butt, then I just said 'Hey,' and moved back to the passenger side and I told him, 'take me home.' " (R.T., Vol. 3, p. 543). Then, Verl Hadley gave Amadee R. a ride home without further incident.

According to Amadee R., Verl Hadley also gave him a ride home from swimming class during November, 1987. Amadee R. testified that he thought that Verl Hadley was trying to do the same thing to him again. (R.T., Vol. 3, p. 544). However, Amadee R. testified that he merely sat on Verl Hadley's lap briefly and felt "[t]hat his dick was kind of like getting hard, then I just sat back on the passenger's side." He never sat on Mr. Hadley's lap again. (R.T., Vol. 3, p. 545).

Finally, Amadee R. testified that another incident occurred on February 1, 1988. (R.T., Vol. 3, p. 546). Again, Amadee R. went to a swimming class in Kayenta, Arizona. According to Amadee R., Mr. Hadley gave him a ride home again. This time, however, Mr. Hadley took Amadee R. to Mr. Hadley's house in Baby Rocks, Arizona.

According to Amadee R., Verl Hadley showed him a movie about "some black men that stole a little boy." (R.T., Vol. 3, p. 551). Verl Hadley asked him to take off his clothes and then placed lotion on his body. Eventually, Verl Hadley allegedly placed lotion "on my dick." "[H]e was kind of like trying to rub it in and then I just hurried up and pulled up my shorts." (R.T., Vol. 3, pp. 553-55). Amadee R. then told Verl Hadley to take him home. Amadee R. arrived home around 9:00 p.m. His older brother, Eddie R., Jr., watched Amadee R. arrive home. Amadee R. did not report the incident to his brother nor to his parents. (R.T., Vol. 3, pp. 556-57).

On cross-examination, Amadee R. admitted that he went to swimming sessions "because I wanted to go". (R.T., Vol. 3, p. 562). Although Amadee R. testified that Verl Hadley had never come to his house and picked him up to go swimming with other children in the car, other witnesses testified to the contrary. (See, e.g., R.T., Vol. 6, p. 1083).

Amadee R. testified that he and Verl Hadley were members of the same clan and considered to be "clan brothers" or "family members". (R.T., Vol. 3, p. 564). It was "common for people in the same clan to do things together like family members". (R.T., Vol. 3, pp. 564-65).

On February 1, 1988, Amadee R. had gone swimming with "a whole group of people . . . from the school". According to Amadee R., he was wearing only shorts. It was a "hot

day". Amadee R. estimated that the temperature was between 80 and 90 degrees. (R.T., Vol. 3, pp. 566-67). However, climatological data introduced at the time of trial showed that the high and low temperatures for February 1, 1988, were actually 25 and 39 degrees. (R.T., Vol. 6, p. 1236).

When Amadee R. was asked to describe Mr. Hadley's trailer, he was able to report that the outside of the trailer was "green and white". Mr. Hadley's trailer sits only a short distance from the highway. Nevertheless, Amadee R. denied that Mr. Hadley's trailer could be seen from the highway. (R.T., Vol. 3, p. 568). When Amadee R. was asked to describe the inside of the trailer, he simply reported that "it is just nice." (R.T., Vol. 3, p. 568). Amadee R. first reported that the inside of the trailer contained three rooms, but later said that it only contained one room. (R.T., Vol. 3, p. 569). Amadee R. could not remember whether or not other trailers surrounded Verl Hadley's trailer. (R.T., Vol. 3, p. 569).

Amadee R., like all of the other children, was interviewed by F.B.I. agents without parental permission or the presence of any adult other than law enforcement officials. The F.B.I. told Amadee R. that he could not leave the room during the interview. He testified that he was afraid of the F.B.I. agents. Amadee R. admitted that he felt that he had to tell the F.B.I. agents something about Verl Hadley before he could leave the room. (R.T., Vol. 3, pp. 574-75, 605-06).

Amadee R. testified that one of the B.I.A. investigators, Sammy Ahkeah, told him that Verl Hadley's hair looked like a girl's hair. (R.T., Vol. 3, p. 590). Amadee R. admitted that he now thinks of Verl Hadley as a "queer", but did not think of him as a "queer" until after he was interviewed by the F.B.I. on February 24 and 26, 1988. (R.T., Vol. 3, p. 591). Amadee R. also admitted that he didn't like Verl Hadley any longer after he was interviewed by the F.B.I. (R.T., Vol. 3, p. 592). Finally, Amadee R. admitted that he told the F.B.I. about Verl Hadley because he felt that he had to tell them something or he would get into trouble with the F.B.I. (R.T., Vol. 3, p. 592).

Amadee R. testified that he was being treated for rectal hernia during 1987-88. He admitted that the hernia was painful. (R.T., Vol. 3, p. 593). He also verified that he visited Dr.

Moore at the Public Health Service Hospital in Kayenta, Arizona, at least five times during December, 1987, and January, 1988. Nevertheless, Amadee R. never said anything to Dr. Moore about Mr. Hadley's alleged sexual misconduct.

Amadee R. also acknowledged that Jonathan T. had been living with his family prior to Christmas, 1988. (R.T., Vol. 3, p. 96). Amadee R. contended that he never talked to Jonathan T. about Verl Hadley. Of course, Jonathan T. expressly testified that Amadee R. had spoken to him extensively about Verl Hadley. (Def. Ex. "I", J.A. 159-61).

3. Other Witnesses

The bus driver for the Chilchinbeto School, John C. Billie, testified that Verl Hadley took Amadee R. home on February 1, 1988, because the school bus encountered mechanical difficulties. (R.T., Vol. 3, pp. 621-26). Amadee R.'s brother, Eddie R., Jr., testified that he observed Verl Hadley dropping Amadee R. off at his home after the swimming session on February 1, 1988. Amadee R. was not upset or troubled. He did not say anything to Eddie R. about Verl Hadley. Furthermore, he observed that Amadee R. was wearing long pants, not shorts. Eddie R., Jr., also recalled that it was freezing on February 1, 1988, rather than eighty or ninety degrees outside. (R.T., Vol. 3, pp. 633-39).

Dr. Kelly Moore, pediatrician, testified that she conducted a physical examination of Amadee R. during February, 1988, for the purpose of investigating potential sexual abuse. She reported that his exam was normal in all respects. He suffered from no lacerations, tears, or fissures. He maintained normal sphincter tone. (R.T., Vol. 3, pp. 640-42).

Moreover, Dr. Moore testified that Amadee R. suffered from an inguinal hernia, which involves the failure of a testicle to drop into the sack. During her treatment of Amadee R. for the hernia, he never complained of or showed any signs of sexual abuse. (R.T., Vol. 3, pp. 644-45).

Several other witnesses testified that Amadee R. was shy around adults and authority figures. However, the trial court precluded defense counsel from asking the witnesses whether

or not Amadee R. was subject to manipulation by adults. (R.T., Vol. 6, pp. 1094-96). Amadee R. was described as "uncomfortable with adults." (R.T., Vol. 6, p. 1099).

Several witnesses testified that Amadee R. was not a truthful person. Lorinda N., age seventeen, testified that Amadee R. is afraid of the police and the F.B.I. She testified that Amadee R. has been known to tell lies since he was a young boy. (R.T., Vol. 6, p. 1147). Gerald Nez, age twenty-two, also testified that he knew Amadee R. from the community church. According to Gerald Nez, Amadee R. not only tells lies, but also falsely accuses other people of misdeeds as well. (R.T., Vol. 6, pp. 1191-95).

4. Prior Bad Acts and FBI Intimidation

The trial of Verl Hadley turned into an evidentiary nightmare when it focused upon prior bad acts. Judge Carroll allowed expert psychiatric testimony from the government to bolster the credibility of the alleged victims. He also allowed the government to introduce extensive evidence of prior bad acts during the trial. Indeed, evidence relating to prior bad acts quickly overshadowed the rest of the trial. A substantial portion of the trial in Verl Hadley's case related to hotly contested evidence of prior bad acts.

On November 7, 1988, the government filed a Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts. (C.R. 44). The government identified prior bad acts relating to Cory K., Amadee R., and Junior H. The government's written motion stated that prior bad acts would show "that defendant's conduct was sexually motivated and not the result of a mistake or accident." Motion in Limine at pp. 7-8. The government also stated that the prior bad acts displayed a common "modus operandi or common plan".

Counsel for Mr. Hadley filed an extensive memorandum in opposition to the government's Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts. (C.R. 50). The memorandum stressed that evidence of prior bad acts was not only highly prejudicial, but irrelevant to any contested issue in the case. Mr. Hadley strenuously argued that neither

"intent" nor "motive" were contested issues at trial. Mr. Hadley's defense at trial readily showed, as he repeatedly promised, that neither intent nor motive were at issue.

The true purpose of the prior bad act evidence, namely propensity, was not always well hidden during trial. At times, the stated purpose of proving the uncontested element of "intent" only thinly masked the most logical application of the evidence, namely propensity. Counsel for the government argued that the admission of prior bad acts "would be extremely probative in helping the jury to determine whether or not the defendant used, in fact, the same method for this conduct and therefore committed the acts in question." (R.T., Vol. 3, pp. 660-62, J.A. 14-16). The prior bad act evidence would "establish that this was not just a one time occurrence, this was not a mistake, this was not an accident . . . ". *Ibid.*

Counsel for Mr. Hadley argued that the alleged victims in this case were influenced by government agents to testify against Mr. Hadley. Mr. Hadley's defense was that he did not commit the acts in question. Mr. Hadley never argued that he may have accidently or mistakenly touched the private areas or sodomized children or that he did so for a purpose other than sexual gratification. The government's purported justification for admitting the prior bad acts was nothing more than a red herring. (R.T., Vol. 3, pp. 660-61, J.A. 14-16).

Judge Carroll reasoned that prior bad acts relating to sodomy would be helpful to the jury in determining Mr. Hadley's motive in merely touching other boys. In other words, according to Judge Carroll, prior bad act testimony would be admissible to show the jury that Mr. Hadley's true motive in touching children was eventually to lead up to sodomy. Yet somehow, Judge Carroll concluded that he was not admitting the prior bad acts for the purpose of showing propensity. (See, e.g., R.T. Vol. April 27, 1989, p. 8, J.A. 12-13, and Vol. 3, pp. 661-62, J.A. 15-16).

Counsel for Mr. Hadley strenuously objected to the admissibility of prior bad act evidence. Defense counsel warned that "the prejudice is absolutely incredible and there would be no way to control that with any instructions . . . in addition, it would require a trial on collateral issues that, by

the time that we are done, will far overshadow the issues that are being tried now." (R.T., Vol. 3, p. 669, J.A. 17-21).

Judge Carroll summarized his position by stating that, "The jury ought to know what kind of person Mr. Hadley is, because it relates to his motive for doing things, or his intention for doing things with these children. . . . Common sense tells me that the jury ought to know something about Mr. Hadley. . . . because it does deal with his motive, his intention and whether or not he was a good guy . . . ". (R.T., Vol. 3, pp. 670-672, J.A. 21-23).

Defense counsel for Mr. Hadley explicitly offered to stipulate that, if any touching occurred by Mr. Hadley, then it occurred for the purpose of sexual gratification. (R.T., Vol. 4, p. 687, J.A. 29-30). Both the trial court and the government refused to consider Mr. Hadley's proposed stipulation. (Also see R.T., Vol. 4, pp. 856-57; Vol. 5, pp. 879-884, J.A. 33-36; Supplemental Memorandum in Opposition to Government's Motion in Limine, J.A. 167-71).

Although the government's motion in limine regarding prior bad acts set forth specific instances of sexual activity between Cory K. and Mr. Hadley, the government asked Cory K. about numerous, unspecified prior bad acts. Mr. K. testified that he engaged in anal intercourse with Mr. Hadley on more than ten occasions. (R.T., Vol. 5, p. 897, J.A. 75-76). Then, Cory K. testified about an incident that allegedly occurred on September 5, 1985. (R.T., Vol. 5, p. 900, J.A. 78). Mr. K. testified that he watched a movie with Mr. Hadley and then engaged in anal intercourse with him while sitting and laying in different positions. (R.T., Vol. 5, pp. 900-903, J.A. 78-80). Then, Mr. K. was allowed to testify about the general course of sexual conduct between he and Mr. Hadley on other, unspecified incidents. (R.T., Vol. 5, pp. 909-10, J.A. 84-85).

On cross-examination, Cory K. testified that he was present on September 5, 1985, with several other persons at Mr. Hadley's residence. Cory K. first testified that he did not drink, but later admitted that he drank alcohol on September 5, 1985. (R.T., Vol. 5, pp. 927-29, J.A. 97-98). He similarly first denied that he drank alcoholic beverages as a general practice prior to September 5, 1985. Later, he admitted that he

got drunk whenever alcohol was offered to him. (R.T., Vol. 5, pp. 927-29, J.A. 97-98).

Cory K. admitted that he drank several cans of beer, as well as shot glasses of gin and Bacardi, on September 5, 1985. He couldn't remember what else he had drunk. He also admitted that he passed out after he drank the alcohol. When he awoke, his clothes had been removed. He assumed that Verl Hadley had sex with him since he was the only one present at the trailer when he awoke. Later, he contended that he remembered "a little bit" about what occurred that night. Mr. K. admitted that he wasn't awake when the sex acts supposedly occurred. (R.T., Vol. 5, p. 928-30, J.A. 98-99).

Cory K. also testified that he was previously interviewed by officers from the Navajo Division of Public Safety relating to the same incident. A charge had been instituted against Mr. Hadley before the Navajo Tribal Court. But, Cory K. refused to testify in support of the accusation. According to Mr. K., he refused to testify because he could not get a ride to court. (R.T., Vol. 5, pp. 947-49, J.A. 111-12).

Cory K. also admitted that he was taken to a doctor for a sexual assault exam during 1985. At that time, the doctor discovered that he had venereal warts. Cory K. testified that he was told by the F.B.I. that if he made a statement against Verl Hadley, he would not have to testify in court. (R.T., Vol. 5, p. 949, J.A. 112-13). Cory K. admitted that he had difficulty remembering conversations that took place relating to the incident of September 5, 1985. (R.T., Vol. 5, p. 954). Despite the fact that Cory K. testified that he had venereal warts, Dr. Ashton testified that Verl Hadley was examined during October, 1985, and was found not to have any venereal warts or diseases. (R.T., Vol. 5, pp. 1046-48).

Unfortunately, the defense was forced into calling numerous witnesses in order to rebut the prior bad act testimony of Cory K. First, Raymond Laughter, former Sergeant with the Navajo Division of Public Safety, testified that he investigated allegations by Mr. K. against Verl Hadley during October, 1985. The story given to Sgt. Laughter was significantly different than the story offered by Cory K. at the time of trial. Further, Sgt. Laughter testified that, in his opinion,

Cory K. was not a truthful person. Sgt. Laughter testified that Cory K. had a reputation in the community of Kayenta of being untruthful.

The second investigating officer for the Navajo Division of Public Safety, Rueban Wiseman, testified that Cory K. never mentioned that he needed a ride to court in order to testify against Mr. Hadley. Mr. Wiseman testified that the Navajo Division of Public Safety would have provided a ride to Cory K. if one was needed. (R.T., Vol. 5, p. 986). Cory K. signed a declaration stating that he would not willingly testify against Verl Hadley. (R.T., Vol. 5, p. 987).

Several persons that were also accused of sexual misconduct by Cory K. during 1985, namely Sampson Yazzie, Arnold Dohi, and Morris Singer, testified at trial as well. Each of the witnesses contradicted the testimony of Cory K. Sampson Yazzie testified that Cory K. was an excessive drinker, was untruthful, and was never seen at Verl Hadley's trailer. Arnold Dohi testified that Cory K. was both a drunk and a liar. (R.T., Vol. 6, pp. 1104-08, 1123-26).

Morris Singer not only testified that Cory K. was both a drunk and a liar, but also testified that Cory K. was "out to get" Verl Hadley. During the summer of 1985, Cory K. threatened to vandalize Mr. Hadley's property and hurt him in different ways. (R.T., Vol. 6, p. 1142). Although Morris Singer was someone that Cory K. confided in during 1985, he never told Morris Singer that he had sexual relations with Verl Hadley. (R.T., Vol. 6, p. 1143).

Several additional witnesses testified that Cory K. was well known as a liar, including Lisa Charley (R.T., Vol. 5, pp. 992-95) and Calvin Hatathlie (R.T., Vol. 5, p. 1028).

One of the witnesses listed by the government to support evidence of prior bad acts, Junior H., testified for the defense. Junior H. testified that he repeatedly told the F.B.I. that Verl Hadley had not touched him. Nevertheless, F.B.I. Agent Schafer accused Junior H. of lying. F.B.I. agents told Junior H. that he had been seen in a car doing something "bad" with Verl Hadley. (R.T., Vol. 5, p. 1004). Junior testified that he was eventually forced by the F.B.I. to make up stories about Verl Hadley. (R.T., Vol. 5, pp. 1004-06).

Later, Junior told other members of his family that he had been forced to lie about Verl Hadley. He missed eleven days of school because he was upset. Later, he contacted the F.B.I. and told them that his stories about Verl Hadley were not true. (R.T., Vol. 5, pp. 1005-10).[2]

B. TESTIMONY OF VERL HADLEY AND THE GOVERNMENT'S CONTINUED CHARACTER ASSASSINATION.

Verl Hadley testified at trial and denied the accusations contained within Counts VII-XI of the superseding indictment. On cross-examination, the government was allowed to question Verl Hadley about numerous, unspecified prior bad acts. The government was allowed to put Mr. Hadley's character and lifestyle on trial, rather than the incidents in question. For instance, the government, over strenuous objections by the defense, continuously asked Mr. Hadley whether he gave automobile rides to minor students (R.T., Vol. 7, pp. 1337 and 1340, J.A. 113-15); whether he ever had any male students as guests at his residence; whether he ever provided

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[2] On cross-examination, the government questioned Junior H. about the prior statements that he gave to the F.B.I. Junior H. testified sternly that the statements were not true. Nevertheless, Judge Carroll refused to give a limiting instruction to the jury. Of course, it is beyond doubt that the prior, recanted and inconsistent statements of Junior H. could not be used as substantive evidence, but may merely for impeachment. (R.T., Vol. 5, pp. 1014-15). Other students provided additional reports of F.B.I. intimidation.

Evidence of prior bad acts involving Travis Y. was not admitted due to the fact that Travis Y. stated that they never occurred. Instead, Travis Y. accused the F.B.I. agents of pressuring him to make incriminating statements against Mr. Hadley. His statements were consistent with many other witnesses who testified that the F.B.I. had pressured them into making incriminating statements against Mr. Hadley. (R.T., Vol. 4, pp. 816-44).

Another student at the Chilchinbeto School, Duane C., age fifteen, testified that the F.B.I. accused him of not telling the truth when he told them that Verl Hadley had not touched him. (R.T., Vol. 5, p. 1038). Yet another student at the Chilchinbeto Day School, Marlow S., age fifteen, also testified that he was repeatedly interviewed by the F.B.I. Although he informed the F.B.I. that Verl Hadley had never touched him inappropriately, the F.B.I. insisted that he was not telling the truth. (R.T., Vol. 6, pp. 1077-78).

alcohol to any male students; whether or not he had a reputation for touching male students in his classes; and whether he had a reputation for tickling students on their thighs or on their backs (R.T., Vol. 7, pp. 1342-44, J.A. 116-18).

Then, the government was allowed to question Mr. Hadley about a traffic citation that he received during 1976 for supposedly allowing an unauthorized minor person to drive his vehicle. No conviction resulted. Although defense counsel strenuously objected, Judge Carroll posited the view that a criminal defendant may be cross-examined on extrinsic matters and prior bad acts more broadly than other witnesses. (R.T., Vol. 8, pp. 1426, 1435, and Vol. 9, pp. 1632-33).

Although the government presented no evidence of any sexual misconduct, counsel for the government was allowed to ask Mr. Hadley whether or not it was unusual for him to allow minor males to sit on his lap and drive his car. The government insinuated that misconduct occurred. According to counsel for the government, a character assassination was appropriate: "He puts his character in issue when he takes the stand." (R.T., Vol. 7, p. 1343).

The government was allowed to cross-examine Mr. Hadley about whether or not he associated with persons much younger in age. (R.T., Vol. 7, p. 1349). Over strenuous objections by Mr. Hadley's attorney, the government was also allowed to ask Mr. Hadley whether or not he had ever engaged in sexual relations with any minors. (R.T., Vol. 7, p. 1375, J.A. 122-23). The government successfully argued to the trial court that it could bait Mr. Hadley by asking him open-ended questions about unspecified, prior bad acts and then, if he generally denied them, introduce evidence of any prior bad acts that may arguably have occurred at any time in history. (R.T., Vol. 7, p. 1376-77, J.A. 123-24).

C. ADDITIONAL PRIOR BAD ACTS – DATING BACK SEVENTEEN YEARS.

Near the close of the trial, the government reportedly discovered a potential witness from Colorado, who was willing to testify that Verl Hadley had repeatedly engaged in anal

intercourse with him seventeen years earlier. (R.T., Vol. 7, pp. 1404-08 and 1415-16). Once again, strenuous objections by defense counsel were to no avail. (R.T., Vol. 8, pp. 1420-16; Vol. 9, pp. 1631-44 and 1648-49). The court reasoned that "the methods of proof that are available to the government" in cases from Indian reservations, where people are "unsophisticated", requires a more liberal rule regarding uncharged misconduct evidence. (R.T., Vol. 9, pp. 1644-45).

Kyle Hartman was allowed to testify that he had engaged in a series of sexual relations with Verl Hadley from 1972 to 1976 when he was a student in Kayenta, Arizona. At that time, Mr. Hadley was a teacher's aid. (R.T., Vol. 9, pp. 1663-73, J.A. 125-33). Mr. Hartman, age twenty-seven, was allowed to testify about numerous, specific acts of sodomy with Verl Hadley that supposedly occurred when he was in grade school. Mr. Hartman testified that he sodomized Mr. Hadley as well. (R.T., Vol. 9, p. 1670, J.A. 130-31).

During closing argument, the government specifically used the testimony of Kyle Hartman to show Mr. Hadley's propensity to engage in sexual conduct with minor children. The government used the testimony of Kyle Hartman to show that Verl Hadley lied when he said he did not have sexual intercourse with minor children. (R.T., Vol. 9, p. 1729). In the same vein, counsel for the government also used the 1976 traffic ticket to argue propensity against Mr. Hadley. (R.T., Vol. 9, p. 1796). The government hinted that both the testimony of Cory K. and Kyle Hartman could be used to show Mr. Hadley's propensity. (R.T., Vol. 9, p. 1798).

D. COURT OF APPEALS PROCEEDINGS

The opinion of the Court of Appeals for the Ninth Circuit approves the admission of all prior bad acts against Mr. Hadley. Employing superficial analysis, the Court of Appeals found all bad acts appropriate since they were "similar" and offered to establish a "specific intent" crime. Little attention was directed to the need for the evidence to establish "intent" or the severe prejudice created by massive evidence of prior

sexual misconduct against children. *United States v. Hadley*, 918 F. 2d 848 (9th Cir. 1990) (J.A. 173-182).

In short, the Court of Appeals applied the "inclusionary rule" of Rule 404(b) without much attention to the pivotal, balancing provision of Rule 403, Federal Rules of Evidence. The Court of Appeals steadfastly refused to consider the judicial admission or proposed stipulation of Mr. Hadley. If the jury found that the acts occurred, Mr. Hadley agreed that they took place for the purpose of arousing the "sexual desire of any person." See Title 18 U.S.C. Sec. 2245(3). Likewise, the Court of Appeals failed to assess the technical or marginal nature of the "specific intent" at stake or the availability of alternate methods of proof.

The opinion of the Court of Appeals is inconsistent with the purpose and key role of Rule 403. Its refusal to review the issue of "specific intent" within the context and particulars of Mr. Hadley's case virtually rendered Rule 403 meaningless. The appellate review offered by the Ninth Circuit in *Hadley* left Rule 403 without any principled guidelines. The *Hadley* decision sets the Ninth Circuit apart from the majority of better-reasoned decisions from other federal circuits.

SUMMARY OF ARGUMENT

Mr. Hadley was charged and convicted of several violations of the Sexual Abuse Act of 1986, which required that he engage in sexual contact with the "intent" to "arouse the sexual desire of any person". See Title 18 U.S.C. Sec. 2245(3). Mr. Hadley's exclusive defense at trial was that the acts did not occur. He conceded the issue of "intent" approximately five months before trial and offered to stipulate to the issue of "intent" during trial.

Mr. Hadley strenuously opposed the introduction of massive amounts of extremely prejudicial prior bad acts to establish the issue of "specific intent" since "intent" was not a disputed issue at trial. The acts of sexual contact alleged against Mr. Hadley necessarily implied "intent" or sexual gratification. The "intent" component of the statute was designed to distinguish between innocent or accidental touchings

from improper sexual contact. But accident or mistake were not issues at trial.

In short, the government simply didn't need evidence of prior sexual misconduct to establish the requisite element of "intent". The incremental, probative value of the prior bad acts was slight, while the unfair prejudice flowing from them reached alarming proportions.

Nevertheless, the trial court allowed the government to introduce layer upon layer of prior misconduct evidence both during its case-in-chief and again during rebuttal. The prior bad acts detailed explicit sexual activity dating back seventeen years. Mr. Hadley was bludgeoned into conviction through the misuse of prior bad acts.

Although Rule 404(b) is an "inclusionary rule" of evidence, which allows the introduction of prior bad acts if relevant to a material issue at trial, the Federal Rules of Evidence have placed special emphasis upon the balancing provision of Rule 403. The Advisory Committee's Notes and pertinent case law require the trial court to consider the "availability of other means of proof", the effectiveness of limiting instructions, unfair prejudice, and the need for the disputed evidence. But, the trial court and the Court of Appeals abandoned the delicate balancing process of Rule 403 in favor of a standard rule that prior misconduct evidence is admissible whenever a "specific intent" crime has been charged. The courts below erroneously concluded that judicial admissions and stipulations need not even be considered. In the face of prejudicial evidence of the highest order calling for a principled balancing process under Rule 403, the courts below created a *per se* rule of admissibility.

We submit that the balancing process of Rule 403 should not be categorically removed from cases involving "specific intent" crimes. Instead, the incremental probative value and unfair prejudice of the challenged evidence should be carefully weighed in light of the various factors presented by the case or, in other words, in a contextual setting. The balancing approach was especially required in this case since the issue of "intent" constituted only a technical or marginal issue and was not disputed.

We submit that no rigid rule dictating the absolute refusal or acceptance of a judicial admission or stipulation is appropriate under Rule 403. Instead, a careful review of the proposed stipulation should occur within the context of all the evidence in the case. Careful attention must be focused upon the incremental, probative value of the proffered evidence, its prejudicial effect, and the availability of other means of proof. We believe that this Court should approve a sensible, middle-ground position that allows a case-by-case review under Rule 403.

ARGUMENTS

A. EXCESSIVE PRIOR BAD ACT EVIDENCE IN THIS CASE WAS NOT ONLY IRRELEVANT, BUT HIGHLY PREJUDICIAL. THE EXCESSES OF THE GOVERNMENT AND TRIAL COURT BLATANTLY DENIED MR. HADLEY A FAIR TRIAL.

The trial court not only repeatedly allowed evidence of prior sexual misconduct, but also progressive sexual misconduct between Mr. Hadley and minor children for the avowed purpose of showing the jury that "[t]he touching was leading up to the sodomy". (R.T., Vol. April 27, 1989, p. 8). Mr. Hadley's trial was little more than a lawless character assassination.

The only genuine issue at trial was whether or not the acts alleged against Mr. Hadley actually occurred. Mr. Hadley's defense was solely that he did not commit the acts alleged against him. Neither "intent" nor "motive" were contested issues in the case. Mr. Hadley contended that the minor children had been unduly influenced by the F.B.I. to accuse him of misdeeds that he did not commit.

1. The Federal Rules of Evidence – The Key is Balancing Probative Value Against Prejudice. The Key was Thrown Away in Mr. Hadley's Case.

Rule 404(a) of the Federal Rules of Evidence allows the accused to present evidence of pertinent character traits that

she possesses, but precludes the government from doing so except to rebut the evidence offered by the accused. "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . ". Rule 404(b) provides that evidence of other crimes, wrongs, or acts is admissible, however, for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[3]

Of course, Rule 403 requires the trial court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." See The Advisory Committee Notes to the 1972 Proposed Rules.

> In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. . . . The availability of other means of proof may also be an appropriate factor.

Advisory Committee's Notes to the 1972 Proposed Rules.

The prejudice flowing from the use of prior convictions or prior bad acts has been repeatedly and soundly noted in American Jurisprudence. As observed by Judge Skelly Wright, prior misconduct evidence:

> . . . not only permits the prosecutor to throw doubt upon the defendant's testimony regarding the facts of the case being tried, but also may result in casting such an atmosphere of aspersion and

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[3] Subsequent to Mr. Hadley's trial, Rule 404(b) was amended to require the prosecution in a criminal case, upon request of the accused, to provide reasonable notice in advance of trial of any evidence of other crimes, wrongs, or acts that the government intends to introduce at trial. The 1991 amendment to Rule 404(b) "is intended to reduce surprise and promote early resolution on the issue of admissibility." See The Advisory Committee Notes to the 1991 Proposed Amendment.

> disrepute about the defendant as to convince the jury that he is an habitual lawbreaker who should be punished and confined for the general good of the community. [cites omitted].

Pinkney v. United States, 363 F. 2d 696, 698 (D.C. Cir. 1966). The delicate balancing process of Rule 403 of the Federal Rules of Evidence must be utilized to insure a fair trial.

Of course, irrelevant evidence is inadmissible under Rule 402, Federal Rules of Evidence. In order to be relevant, evidence must be material to an issue in the case. See Rule 401. "If the relevancy of the proffered evidence is suspect or slight but would likely be prejudicial then any justification for its admission is slight or non-existent." Vol. 10, *Moore's Federal Practice*, Sec. 403.02[3] (1988).

The rule excluding evidence of prior bad acts emerged in England in response to the Star Chamber proceedings. The Treason Act of 1695 expressly provided that an overt act not stated in the indictment could not be proven at trial. Eventually, the principles of the Treason Act of 1695 became the standard for basic fairness in criminal trials throughout England. By the end of the Eighteenth century, England employed a general rule excluding evidence of other crimes and accusations not listed in the indictment. Of course, exceptions to the exclusionary rule later developed. See, Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 Cin. L. Rev. 713 (1981) [hereinafter referred to as *Reed I*].

Indeed, some of the provisions of the Treason Act of 1695 were later incorporated into the charters of various American colonies and eventually appeared in the Bill of Rights to the Federal Constitution. *Reed I* at p. 721. American jurisprudence generally provided for a rule of exclusion with several, identified exceptions. The American rule was delineated in the landmark decision of *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286, 294-310 (1901).

In many cases intent may be inferred from the nature of the act alone. In *Molineux*, the question was whether or not the defendant intended to kill through the use of poison.

> Could such a foul and cunningly devised act have been innocently done? Could proof of any number of repetitions of this act add anything to the conclusive inference of criminal intent which proof of the act itself affords? Can it be possible that, in the face of such irrefragable indicia of murderous intent, it is still necessary or proper to prove the commission of other similar crimes to establish intent?

61 N.E. 286, 296 (N.Y. 1901). The *Molineux* court held that the prosecution could not rebut the defense of accident or mistake by anticipation, but if the defense raised accident or mistake, then the prosecution could use evidence of other criminal activity to rebut the defense. 61 N.E. 286, 298-99 (N.Y. 1901). The same queries and conclusions apply to the case at bar.

> It would be a travesty upon our jurisprudence to hold that, in a case of such appalling and transparent criminality, it could ever be deemed necessary or proper to resort to proof of extraneous crimes to anticipate the impossible defense of accident or mistake. The same irrefutable logic of fact and circumstance that establishes felonious intent as clearly negatives the possibility of accident or mistake.

People v. Molineux, 61 N.E. 286, 298-99 (N.Y. 1901). *Molineux* has been cited extensively by state and federal courts since 1901. It has served as "the basis for the jurisprudential development of the rule in both federal and state courts." *Reed I* at p. 735.

Of course, the Federal Rules of Evidence adopted an "inclusionary rule" rather than an "exclusionary rule" regarding evidence of other crimes. In other words, evidence of other crimes is admissible for any relevant purpose other than to prove the accused's bad character. The inclusionary rule is restricted by the provisions of Rule 403, which require the exclusion of character evidence if the prejudice to the accused substantially outweighs its probative value.

To a great extent, the inclusionary rule parallels Dean Wigmore's character rule. Wigmore argued that evidence of prior bad acts should be excluded only when they are offered

to establish the accused's propensity to commit the crime. *Wigmore on Evidence*, Sec. 193-94, 216 (1904). Wigmore employed behavioral theory of his day to support his proposition that a specific fact may be inferred from the general disposition of the actor. See Wigmore, *Principles of Judicial Proof* (1913).

> Wigmore dedicated the book to Hans Gross, a leading exponent of "criminal psychology." Wigmore included in his own treatment of proof excerpts from Gross' writing on habit formation and the predictability of future human behavior from prior human conduct. Wigmore also used extracts from James Sully's *The Human Mind* to illustrate his nascent science of proof.

Reed I at p. 737.[4]

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[4] In essence, Wigmore preferred a form of "deterministic human behavioral science" to support portions of his treatise on character evidence. *Ibid.* The popularity of American stimulus-response learning theory gave further scientific respectability to the use of prior criminal acts to prove that an individual would repeat similar crimes in the future when exposed to similar exterior stimuli. *Reed I* at p. 739.

"Early psychological theories supported the common law's intuition that character evidence was predictive of behavior . . . 'Trait theory' essentially holds that the behavior of a given individual is governed by personality traits that exert sufficient influence to produce generally consistent behavior in widely divergent situations." Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 And The Impact of Recent Psychological Studies*, 31 U.C.L.A. Law Review 1003 at 1051 (1984). One of the chief proponents of "trait theory", however, has now acknowledged its weakness. Compare, G. Allport, *Personality – A Psychological Interpretation*, 521 (1937), and G. Allport, *Traits Revisited*, 21 Am. Psychologist 1, 9 (1966). Modern emperical studies have rejected the trait theory. See e.g., W. Mischel, *Personality and Assessment* (1968); D. Peterson, *The Clinical Study of Social Behavior* (1968); P. Vernon, *Personality Assessment: A Critical Survey* (1964).

In particular, modern research has also discredited the old belief that the recidivism rate among sex offenders is extraordinarily high. The Federal Bureau of Investigation has even rated the recidivism rate among sex offenders as quite low. See, e.g., Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 4:16 (1984); Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. Law Rev. 604, 616 (1989); Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 Kan. L. Rev. 411, 424 (1972); Slough & Knightly, *Other Vices, Other Crimes*, 41 Iowa L. Rev. 325, 335-36 (1956); Gregg, *Other Acts of*

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The "inclusionary rule" has placed special emphasis upon the balancing provision of Rule 403, which authorizes exclusion of relevant evidence by the trial court. Rule 403 was designed to override all other evidentiary rules. J. Weinstein and M. Berger, *Weinstein's Evidence*, Sec. 403[01] (1985).

> Thus, the discretionary balancing test of Rule 403 is the only check on the admission of extrinsic and intrinsic criminal acts of the accused not listed in the indictment. If the courts are to find an adequate solution to the dilemma, they must apply principled guidelines when weighing the probative value of the extrinsic or intrinsic criminal act against the prejudice it would cause to the accused.

Reed, *Admission of Other Criminal Act Evidence after Adoption of the Federal Rules of Evidence*, 53 Cin. L. Rev. 113, 169 (1984) [hereinafter referred to as *Reed III*]. "The federal rules' expansion of the scope of prosecutorial use of evidence of other crimes and the federal courts' willingness to admit such evidence is subtly transforming the American criminal justice system from an accusative to an inquisitorial process." *Reed I* at p. 714.

If anything other than broad judicial discretion applies to the balancing test of Rule 403, when used in conjunction with Rule 404(b), then the admission of overwhelming prior bad act evidence in Mr. Hadley's case was inappropriate. Clearly, some limits should apply. If any rational limit exists, then the facts of this case show that the limit was exceeded.[5]

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Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 Ariz. L. Rev. 212, 232-33 (1965); Case Comment, 2 Fla. St. U.L. Rev. 197, 201 (1974). Also see, Lawson, *Credibility and Character: A Different Look at an Interminable Problem* (1975), 50 Notre Dame Lawyer 758, 780-83 (Describing Wigmore's reliance on psychological studies of his day, which have been discredited by contemporary studies). The logic of the rules of character evidence, especially the inclusionary provision of Rule 404(b), has proven to be incongruent with empirical data unless tempered by Rule 403.

[5] This Court has previously recognized that character evidence should be excluded unless relevant to a "disputed issue". This Court has expressed concern

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2. "Intent" was only a Technical Issue – A Red Herring. "Intent" Could be Inferred from the Nature of the Act Alone.

Of course, we recognize that Mr. Hadley was charged with specific intent crimes. As emphasized by the Court of Appeals for the Ninth Circuit, "[t]o demonstrate sexual contact the government had to prove that Hadley acted 'with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.' Title 18 U.S.C. Sec. 2245(3). The district court found that the prior acts 'have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature.' " *Hadley*, 918 F. 2d 848, 851.

But, the analysis employed by the Court of Appeals is superficial to the point of being nonexistent. The Ninth Circuit emphasized that "the evidence helped to demonstrate specific intent, the proof of which was required in all three counts. On this basis, it was properly admitted." *Hadley*, 918 F. 2d 848, 851 (9th Cir. 1990). As a result, the Court of Appeals concluded that the admission of apparently limitless prior bad acts against Mr. Hadley was justified. Little analysis regarding "materiality" or the balancing test of Rule 403 was employed. We submit that the Court of Appeals has authorized broad character assassinations under the facade of allowing evidence of other crimes to prove specific intent under Rule 404(b). Clearly, something more is needed in order to provide true meaning to the balancing test of Rule 403 and to return some semblance of a fair trial to accused citizens.

The utility of the balancing process under Rule 403 cannot be denied in cases involving sexual misconduct against children. The relative amount of prejudice is extremely high. It would be ridiculous, we submit, to allow an

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"that unduly prejudicial evidence might be introduced under Rule 404(b)." *Huddleston v. United States*, 485 U.S. 681, 685 and 691 (1988). Although this Court found that evidence of the "battered child syndrome" in the face of a claim of accidental injury did not create errors that rose to the level of a due process violation in *Estelle v. McGuire*, 502 U.S. ___, 116 L.Ed.2d 385, 396-97 (1991), this Court has not directly addressed the important issues raised by Mr. Hadley. *McGuire* was a federal *habeas corpus* action which reviewed matters of state law.

open door policy of admitting prior misconduct evidence outside the scope of the balancing test employed by Rule 403 in cases involving allegations of sexual misconduct toward children. Instead, these volatile cases require the balancing test of Rule 403 more than any other category of cases.[6]

The issue of "intent" relied upon by the Ninth Circuit is evanescent. It is simply impossible to argue with a straight face that Verl Hadley could attempt to insert his penis into the anal opening of a young boy for some purpose other than sexual gratification. Five months prior to trial, Mr. Hadley unequivocally stated that neither "intent" nor "motive" were disputed or genuine issues in the case.

Federal courts have excluded evidence of other crimes or misconduct in cases involving specific intent crimes when the intent required by the statute could be inferred from the nature of the act. *United States v. Ring*, 513 F. 2d 1001, 1004-09 (6th Cir. 1975); *United States v. Goodwin*, 492 F. 2d 1141, 1148-55 (5th Cir. 1974); *United States v. DeCicco*, 435 F. 2d 478, 483-84 (2nd Cir. 1970); *United States v. Fierson*, 419 F. 2d 1020, 1022-23 (7th Cir. 1969).

> Whether there is a material issue as to this element of intent depends not on the statutory definition of the offense but on the circumstances of the case and the nature of the offense. A defendant who admits committing an act but relies on innocence, mistake, or lack of knowledge to exculpate him has made an

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[6] Experienced trial attorneys know that the judge's ruling on the admission of uncharged misconduct can be the turning point in a trial. Uncharged-misconduct evidence "will usually sink the defense without a trace." Some veteran defense attorneys shape their entire trial strategy to avoid the admission of uncharged misconduct.

> The available research data confirms this belief. . . . The uncharged misconduct stigmatizes the defendant and predisposes the jury to find him liable or guilty. [notes omitted].

Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 1:02 (1984 and 1992 Supp.). Uncharged misconduct evidence has been described as the "most prejudicial evidence imaginable against an accused". *People v. Smallwood*, 228 Cal. Rptr. 913, 722 P. 2d 197, 205 (1986).

> issue of intent. A defendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred.

United States v. Adderly, 529 F. 2d 1178, 1180-81 (5th Cir. 1976). As noted by Imwenkerlied, "The ideal case for exclusion is one in which (1) the defendant has not affirmatively claimed accident and (2) the nature of the crime is such that accident would not be a plausible defense." Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 5-10 (1984).

Evidence of prior bad acts is inappropriate in cases where the mental state can be inferred from the surrounding circumstances. *United States v. Gruttadauro*, 818 F. 2d 1323, 1327-28 (7th Cir. 1987). "When the mere doing of the act demonstrates criminal intent, evidence of other misconduct offered to prove general or specific intent is immaterial." Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1222 (1986) [hereinafter cited as "The Logical Inconsistencies"].

> Roach's defense was that he did not commit the act. He does not, as well he could not, contend that he committed the act with innocent intent. [cites omitted] . . . We do not believe that intent was sufficiently at issue to allow the questioned evidence as probative of intent.

State v. Roach, 109 Idaho 973, 712 P. 2d 674, 676 (1985) (Lewd and lascivious conduct with a minor child); *Coler v. State*, 418 So. 2d 238, 239 (Fla. 1982). "It follows then, that if intent to commit the crime is inferred from the mere commission of the act, evidence of prior crimes may not be admitted under the intent exception." Summers, *Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecutions*, 36 Tenn. L. Rev. 515, 518 (1969).[7]

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[7] For instance, "it is difficult to imagine how a printer could accidentally or mistakenly produce counterfeit $20 bills." Wright & Graham, *Federal Practice and Procedure: Evidence*, Sec. 5247 (1978). "One would like to think that a

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The "intent" component of the relevant provisions from the Sexual Abuse Act of 1986 requiring "sexual gratification" parallels the provisions of the Model Penal Code Sec. 213.4 (A.L. I 1980). The commentary to the Model Penal Code shows that " 'the specific intent' " component of the definition of sexual contact was inserted primarily to distinguish innocent or accidental touchings from improper sexual contact . . . That is, it appears to have been included as a means of describing and distinguishing non-criminal from criminal touchings, and not as a means of imposing a greater burden of proof on the government, or as a 'backdoor' method of introducing prior bad acts evidence."[8]

3. The Statutory Element of "Intent" was not a Contested Issue. The Prior Bad Acts Were Unnecessary.

A bare plea of not guilty is insufficient to allow the admission of uncharged misconduct evidence on an uncontested issue. "The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice." *Thompson v. The King*, [1918] A.C. 221, 232-33.

> If it is unrealistic to assume that the defendant will contest the issue and the issue is only technically in dispute and not in substance, most courts exclude

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court justifying admissibility under the present exception in such a case was itself a victim of mistake or accident." *Ibid.* See, *United States v. Manafzadeh*, 592 F. 2d 81, 88 (2nd Cir. 1979) (Where defendant denied participation in the charged acts, and there was no defense that the defendant committed the acts as a result of mistake or accident, evidence of other crimes was not admissible to prove intent); *State v. Jackson*, 102 Wash. 2d 689, 689 P. 2d 76, 79 (1984). Contrast the following cases where mistake or accident were directly in issue; *State v. Craig*, 219 Neb. 70, 361 N.W. 2d 206, 211 (Neb. 1985); *United States v. Harris*, 661 F. 2d 138, 142 (10th Cir. 1981); *State v. Stewart*, 219 Neb. 347, 363 N.W. 2d 368, 370 (1985).

[8] The use of prior offenses to establish specific intent is based upon the "doctrine of changes" or the doctrine of probability. *Wigmore on Evidence*, Sec. 302 (3d ed. 1980). The doctrine is used to negative accident, mistake, inadvertence or other innocent mental state, based upon the principle that similar results do not usually occur repetitively through abnormal or unintentional causes.

> the prosecution's uncharged misconduct. The issue is a mere phantom.

Imwenkerlied, *Uncharged Misconduct Evidence*, Sec. 8:10 (1984); Cowen & Carter, *Essays on the Law of Evidence*, 128-29 (1956); Wright & Graham, *Federal Practice and Procedure: Evidence*, Secs. 5242 and 5249 ("The issue of intent must be seriously disputed"); Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 Cin. L. Rev. 299, 307-08 (1982) [hereinafter referred to as *Reed II*].

> "Probative worth," however, consists of more than logical relevance or persuasiveness. No matter how persuasive of the fact it is supposed to prove, other crimes evidence has no probative worth if the fact is not in issue . . . [b]ecause such evidence does not advance the search for truth, it serves no purpose which might justify whatever prejudice it creates, and is excluded for that reason.
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> * * *
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> Clearly, prosecutors are aware of the usefulness such evidence has in securing convictions, and the temptations to introduce this evidence in the hope that it will have a prejudicial effect are undoubtedly great. . . . At the very least, therefore, the prosecutor should be required to offer all more direct and less volatile data before he relies on other crimes information. The "necessity" rule, if applied to all evidence at the prosecutor's command, will tend to insure this result. [footnotes omitted].

Notes and Comments, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L. J. 763, 770-73 (1961).

"On the other hand, the presence or absence of a genuine need for the questioned evidence is a legitimate part of the balancing analysis required by Federal Rule of Evidence 403. [cites omitted]." *United States v. Schwartz*, 790 F. 2d 1059, 1061 (3rd Cir. 1986). Generally, an issue of "intent" does not exist when the defendant claims that he did not do the charged act at all. See, *United States v. Powell*, 587 F. 2d 443, 448 (9th Cir. 1978) ("When a defendant denies participation in the act or acts which constitute the crime, intent is not a material

issue for the purpose of applying Rule 404(b)); *United States v. Silva*, 580 F. 2d 144, 148 (5th Cir. 1978) ("[D]efendant who denies participation in an act raises no discrete issue of intent and if the act be proven the intent will usually be inferred."). "Sanchez points out, however, it has been held that where a defendant categorically denies any sexual involvement with the child he does not place his intent in issue." *People v. Sanchez*, 256 Cal. Rptr. 446, 464 (Cal. App. 4 Dist. 1989).[9]

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[9] "Where the nature of the evidence and the actions of the defense make it clear that intent is not being meaningfully controverted, the other crimes evidence must be excluded." *Landrum v. United States*, 559 A. 2d 1323, 1328 (D.C. App. 1989). "Defendants who deny participation in the act do not raise the issue of intent, thereby exposing themselves to evidence of other misconduct, where the performance of the act would indisputably show criminal intent." *The Logical Inconsistencies*, 61 Wash. L. Rev. 1213, 1222 (1986); *United States v. Ortiz*, 857 F. 2d 900, 904 (2nd Cir. 1988); *United States v. Oppon*, 863 F. 2d 141, 149 (1st Cir. 1988) (J. Coffin, concurring) "If the mere existence of [intent] justified the admission of prior bad acts, the general bar against propensity evidence would be swallowed up." [cites omitted]), *United States v. Simon*, 842 F. 2d 552, 555-56 (1st Cir. 1988) (J. Torruella, concurring); *Thompson v. United States*, 546 A.2d 414, 422-23 (D.C. App. 1988).

> If the Government has a strong case on the intent issue, as here, the extrinsic offenses may add little and consequently will be excluded more readily; if the defendant's intent is not contested, the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice.

United States v. Soundingsides, 820 F. 2d 1232, 1237 (10th Cir. 1987). *State v. Harris*, 123 Wis. 2d 231, 365 N.W. 2d 922, 925 (Wis. App. 1985) (The opinion cites the Federal Advisory Committee's Note to Rule 404(b)); *Whitty v. State*, 34 Wis. 2d 278, 149 N.W. 2d 557, 565-66 (1967), *cert. denied*, 390 U.S. 959 (1968) ("Piling on such evidence as a final 'kick at the cat' when sufficient evidence is already in the record runs the danger, if such evidence is admitted, of violating the defendant's right to a fair trial because of its needless prejudicial effect on the issue of guilt or innocence."); C. McCormick, *Evidence*, Sec. 190 (3rd Ed. E. Cleary 1984 and 1987 Supp.)

As Wigmore notes, admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." It breeds a tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses . . . ". *Wigmore on Evidence*, Sec. 194; *United States v. Gubelman*, 571 F. 2d 1252, 1254 n.8 (2d Cir. 1978) ("These issues were at best only technically in dispute, since appellant's defense was that he took no bribes at all,

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"The exclusion of other crimes evidence is not simply a 'technicality' designed to prevent law enforcement personnel from doing their job; it reflects and gives meaning to the central precept of our system of criminal justice, the presumption of innocence". *United States v. Daniels,* 770 F. 2d 1111, 1118 (D.C. Cir. 1985); *Landrum v. United States,* 559 A. 2d 1323, 1327 (D.C. App. 1989). "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is". *United States v. Myers,* 550 F. 2d 1036, 1044 (5th Cir. 1977). "Once evidence of prior crimes reaches the jury, 'it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence.' " *United States v. Daniels,* 770 F. 2d 1111, 1118 (D.C. Cir. 1985), quoting from *Government of the Virgin Islands v. Toto,* 529 F. 2d 278, 283 (3rd Cir. 1976).[10]

The *Hadley* decision needlessly sterilizes the balancing test of Rule 403 by simply admitting prior misconduct

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not that he received money or other things of value unknowingly." [cites omitted]).

England has also adopted the "necessity" position. See *Noor Mohammed v. The King* [1949] A.C. 182, 190-96.

[10] Although several state courts recognize an exception to the prohibition against using propensity evidence to establish guilt in cases involving sexual misconduct against children, the antiquated exception did not survive the adoption of the Federal Rules of Evidence. See, Imwenkerlied, *Uncharged Misconduct Evidence,* Sec. 4:11-4:19 (1984). Also see, *Getz v. State,* 538 A.2d 726, 733 (Del.Super.1988). It is interesting to note that the government relied upon old cases decided by the State of Arizona to support its request to allow evidence of prior bad acts. See, *Government's Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts* at pp. 6-7 ("Arizona case law is instructive . . . ") (C.R. 44). Arizona had expressly allowed a special exception to the "exclusionary rule" for admitting prior misconduct evidence in sex offense cases. But since 1977, the exception only applies if expert testimony establishes the defendant's disposition toward sex offenses. *State v. Treadaway,* 116 Ariz. 163, 568 P. 2d 1061 (1977); Imwenkerlied, *Uncharged Misconduct Evidence,* Sec. 4:17 (1984). While the government relied upon the antiquated sexual propensity exception, it did not attempt to provide the expert testimony required by *Treadaway.* The government was simply mistaken about the propriety of prior misconduct evidence under the Federal Rules of Evidence.

evidence whenever the defendant is charged with a specific intent crime. Several decisions from the Seventh Circuit have also placed barricades between Rule 403 and "specific intent crimes". *United States v. Monzon,* 869 F. 2d 338, 344 (7th Cir. 1989), *cert. denied,* 109 S. Ct. 2087 (1989) ("In cases involving specific intent crimes, intent is automatically an issue regardless of whether the defendant has made intent an issue in the case."); *United States v. Mazzanti,* 888 F. 2d 1165, 1171 (7th Cir. 1989), *cert. denied,* 110 S. Ct. 2167 (1990); *United States v. Chaimson,* 760 F. 2d 798, 806 (7th Cir. 1985). But see, *United States v. Fierson,* 419 F. 2d 1020, 1023 (7th Cir. 1969) (Issue of specific intent must be disputed to justify admission of prior bad acts). The rigid rule of the *Hadley* decision and the Seventh Circuit effectively eliminates the balancing test of Rule 403. It invites wholesale misuse of prior misconduct evidence.

> Evidence directed to a category other than propensity is not, however, admissible unless this issue is actually being controverted. This is simply a specialized application of the usual rule that evidence must be probative of a fact that is of consequence, that is to say material, to an action in order to be relevant. [cite omitted]. Although this is an elementary principle of the law of evidence, it has proven difficult to apply in a number of contexts involving other crimes evidence.

Weistein's Evidence, Sec. 404[09] (1985).

Even the Seventh Circuit, however, holds that prior misconduct evidence is not admissible if the defendant did not directly put his or her mental state in issue when the crime charged is a general intent crime rather than a specific intent crime. *United States v. Gruttadauro,* 818 F. 2d 1323, 1327-28 (7th Cir. 1987), *United States v. Hudson,* 884 F. 2d 1016, 1018-22 (7th Cir. 1989), *cert. denied,* 110 S. Ct. 3221 (1990); *United States v. Harrod,* 856 F. 2d 996 (7th Cir. 1988); *United States v. Manganellis,* 864 F. 2d 528, 531-39 (7th Cir. 1988). The pivotal balancing test of Rule 403 should not be absolutely barred when it may be needed most. The balance of prejudice versus probative value is essential for "specific intent" crimes too!

Indeed, other Ninth Circuit cases are inconsistent with the holding of the three judge panel in *Hadley*. See, *United States v. Brown*, 880 F. 2d 1012, 1013-17 (9th Cir. 1989) (Since motive was not a disputed issue at trial, the introduction of prior bad act evidence constituted prejudicial error); *United States v. Powell*, 587 F. 2d 443, 448 (9th Cir. 1978).

4. The Prior Bad Acts Were Prematurely Allowed During the Government's Case-In-Chief. The Weighing Process of Rule 403 Was Not Utilized.

In many cases, the key to a fair trial depends upon the omission or exclusion of prior bad act evidence. Although the trial court is blessed with wide discretion, the Court is also obligated to carefully balance the incremental probative value of the proffered evidence against unfair prejudice. But, "it may be difficult to strike this balance until the defense's case is concluded, permitting the government's need for the evidence to be weighed against the ensuing prejudice to the defendant." *Weinstein's Evidence*, Sec. 404[09] (1985); *United States v. Danzey*, 594 F. 2d 905, 914 (2nd Cir. 1979), *cert. denied*, 441 U.S. 951 (1979); *United States v. Alessi*, 638 F. 2d 466, 477 (2nd Cir. 1980); *United States v. Figueroa*, 618 F. 2d 934, 939 (2nd Cir. 1980); *United States v. Robinson*, 560 F. 2d 507, 515 (2nd Cir. 1977), *cert. denied*, 435 U.S. 905 (1978). Mr. Hadley's attorney requested that Judge Carroll wait until the close of Mr. Hadley's case to determine whether "intent" or "motive" were contested issues in the case. Then, a more informed decision could be made about the probative value of the proffered evidence. Judge Carroll, however, refused to stay his hand. (R.T. Vol. III, p. 674).[11]

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[11] The use of timing as a tool to implement the balancing process of Rule 403 has not been restricted to the Second Circuit, but has been employed by the Seventh Circuit as well:

> On the other hand, we have stated that when intent is only a formal issue, so that proof of the proscribed act gives rise to an inference of intent, then unless the government has reason to believe that the defense will raise intent as an issue, evidence of other acts directed

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5. The Prejudice was Overwhelming, While the Probative Value was Slight.

Justice Cardozo noted that uncharged misconduct evidence can be a "peril to the innocent". *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466, 468 (1930). "In our system of jurisprudence, we try cases, rather than persons." *People v. Allen*, 429 Mich. 558, 420 N.W. 2nd 499, 503-504 (1988).

But, the careless introduction of prior misconduct evidence removes vitality from the philosophical underpinnings of our accusatory, rather than inquisitorial, system of justice. "A drop of ink cannot be removed from a glass of milk." *Government of Virgin Islands v. Toto*, 529 F. 2d 278, 283 (3rd Cir. 1976); *Reed III* at 166-69.[12]

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> toward this issue should not be used in the government's case-in-chief and should not be admitted until the defendant raises the issue . . . To allow intent automatically to become an issue in that class of cases in which intent is inferable from the nature of the act charged would create an exception that "would virtually swallow the rule against admission of evidence of prior misconduct." *United States v. Ring*, 513 F. 2d 1001, 1009 (6th Cir. 1975).

United States v. Shackleford, 738 F. 2d 776, 781 (7th Cir. 1984). Also see, *Landrum v. United States*, 559 A. 2d 1323, 1326 (D.C. App. 1989) ("[W]e have held, and reiterate today, that, absent exceptional circumstances, the government should not be permitted to introduce other crimes evidence in its case-in-chief to prove intent."); *State v. Harris*, 123 Wis. 2d 231, 365 N.W.2d 922, 926 (Wis. App. 1985); Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 Pepperdine L. Rev. 297, 304 n. 28 (1982).

[12] Professor Reed argues strongly that, at the least, the defendant must be given notice in advance of trial that the government intends to utilize evidence of uncharged misconduct. Otherwise, the accused is denied the right to be informed of the nature of the charges pending against him or her as guaranteed by the Sixth Amendment. Of course, we know that Mr. Hadley was not given notice of some of the most vicious prior bad acts used against him at trial. Mr. Hadley was not given any opportunity to investigate or rebut the evidence of prior bad acts introduced by the government. *Reed III* at pp. 166-69 (1984). Unfair surprise is an additional factor to apply under Rule 403. Rule 404(b) has now been amended to require the government to give advance notice of proposed evidence of prior bad acts before trial.

Unfortunately, the prejudice flowing from evidence of prior sexual misconduct against children is at its highest degree. See, e.g., *State v. Smith,* 106 Wash. 2d 772, 725 P. 2d 951, 952 (1986); *State v. Treadaway,* 116 Ariz. 163, 586 P. 2d 1061, 1065 (1977).

> [T]o bombard the [factfinder] with evidence that appellant is a child abuser in general . . . presents a classic example of the kind of evidence which hopelessly distracts the [factfinder] from the issues [it is] called upon to resolve and adulterates the deliberative process.

Clark v. State, 693 S.W. 2d 35, 38 (Tex. App. 1985).

On the other hand, the incremental probative value of the prior misconduct evidence on the marginal issue of "intent" was nearly non-existent. "Prior sexual offenses and other heinous crimes can be extremely damning, even though their logical relation to the crime charged may be tenuous." Notes and Comments, *Other Crimes Evidence At Trial: Of Balancing and Other Matters,* 70 Yale L. J. 763, 773 (1961). The use of similar extrinsic bad acts is especially dangerous "because the prejudice to the accused . . . is often much greater than the probative value of such an offense . . . ". *Reed III* at pp. 168-69. Again, the conclusion is punctuated in cases like Mr. Hadley's because "of the intensely emotional nature of prosecutions for sex crimes which heightens the possibility of juror prejudice." Snively, *Time for Change: Evidentiary Safeguards Needed in Trials for Sexual Offenses,* 11 Ind. L. Rev. 895 (1978); Kyser, *Developments in Evidence of Other Crimes,* 7 J. of Law Reform 535, 544 (1974); London School of Economics Jury Project, *Juries and the Rules of Evidence,* 1973 Crim. L. Rev. (Eng.) 208.

The balancing process of Rule 403 should be employed in an informative and meaningful manner, which takes into account the conclusions of contemporary empirical studies, rather than psychological misunderstandings of Dean Wigmore's era. Rule 403 should be utilized carefully to ensure a fair trial.

As opposed to erroneous assumptions of the "trait theory" of personality, jurors tend to draw a "complete, integrated image of []personality" from negative, fragmented information about a person (bad act evidence). "It appears certain that when the law requests jurors to give character evidence a restricted use, it demands a 'mental gymnastic which is beyond, not only the jury's power, but anybody else's.' " Lawson, *Credibility and Character: A Different Look at an Interminable Problem,* 50 Notre Dame Lawyer 758, 774 (1975), [hereinafter referred to as "Credibility and Character"], quoting from *Nash v. United States,* 54 F. 2d 1006, 1007 (2nd Cir. 1932). "This reaction is known as the 'halo effect' – 'one outstanding 'good' or 'bad' quality in a person casts its reflection upon all judgments pertaining to him.' " *Ibid.* at p. 778 [footnote and cites omitted]. The "misinterpretation mechanism" tends to severely overestimate the weight of prior bad acts evidence [*Ibid.* at pp. 778-786.], prompting one writer to rename the misinterpretative mechanism as the "devil's horns effect". Mendez, *Character Evidence,* at p. 1047 (See, *supra,* n.4). Also see, Imwenkerlied, *Uncharged Misconduct Evidence,* Sec. 1:02-1:03 (1984 and 1992 Supp.) (numerous studies and articles cited); Note 4, *supra.*

The real goal of Rule 403 is "securing truth through procedural fairness", which means "rendition of verdicts by an unbiased jury based upon the logical implications of the evidence. Rule 403 can advance truth and fairness by excluding evidence that tends to induce the jury to think illogically or employ an improper basis." Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence,* 18 Univ. of Calif., Davis 59, 67-69 (1984). "Evidence has probative value if it enhances the accuracy of jury factfinding . . . On the other hand, evidence is unfairly prejudicial when it detracts from the accuracy of factfinding by inducing the jury to commit an inferential error. Inferential errors occur when the jury perceives evidence to be logically probative of a fact when it is not, perceives the evidence to be more probative of fact than it logically is, or bases its decision on improper basis." *Ibid.* at p. 73.

As emphasized by the Advisory Committee's Notes to Rule 403, probative value must be viewed as the "product of the logical potential of evidence in the evidentiary and cognitive context within which it is offered." In turn, unfair prejudice "must refer, in part, to the tendency of evidence to lead the jury to commit an inferential error", including improper bias, illogical inferences, overvalued inferences, undue confusion or emotion. Gold, *supra,* at pp. 76-83.

In order to apply Rule 403, judges must consider and predict jury reaction to evidence. Recent empirical research must be evaluated. "For example, if the jury is equally likely to draw proper or improper inferences, the extent of the resulting benefit or distortion can become critical. If the distorting effect of the improper inference is great while the beneficial effects of the proper inference are small, such evidence should be excluded." Gold, *supra,* at p. 89.

If we apply the careful balancing approach suggested by Professor Gold, in light of the contextual variables of the trial and the marginal issue of "intent" at stake, exclusion of the prior bad acts evidence is clearly warranted. Empirical "research casts serious doubts on the assumed probative value of character evidence and appears to confirm the law's concern that such evidence carries undeserved weight." Mendez, *Character Evidence,* at p. 1059; Lawson, *Credibility and Character,* at p. 786 ("[T]he data most certainly reveal that the probative worth of character evidence is very low.") "[W]here intent is a necessary conclusion from the act, and the act charged is not equivocal, proof of other offenses to cast light upon intent, even though similar in nature, should not be permitted under any circumstances." Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma,* 20 Kan L. Rev. 411, 418 (1972).

Other crimes evidence should not be admitted "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *United States v. Kahaner,* 317 F. 2d 459, 471-72 (2nd Cir. 1963), *cert. denied,* 375 U.S. 836 (1963). The prior bad acts did not establish the guilt of Mr. Hadley on

the offenses charged, but painted him as an undetected and unpunished child molester.[13]

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[13] Several, additional factors added to the prejudice and negated the probative value of the evidence delivered by the prior acts. (1) The extreme, explicit acts involving Kyle Hartman were quite remote (ranging up to 17 years). (2) The government misused the evidence during closing argument to show propensity. (3) The government improperly baited Mr. Hadley by asking him questions on cross-examination relating to numerous, alleged bad acts, his supposed character profile, and adverse reputation. (4) Finally, the trial court refused to grant a continuance to Mr. Hadley so that he could contend with the unfair surprise created by Mr. Hartman's testimony.

The Government's cross-examination of Mr. Hadley to establish or insinuate the existence of other bad acts was clearly beyond the scope of direct examination in violation of Rule 611(b), Federal Rules of Evidence. Moreover, inquiry into specific instances of misconduct on cross-examination requires that the acts must be clearly probative of truthfulness or untruthfulness. *Crimm v. Missouri Pacific R. Co.,* 750 F. 2d 703, 707 (8th Cir. 1984); *United States v. Rubin,* 733 F. 2d 837, 841-42 (11th Cir. 1984); *United States v. Mansaw,* 714 F. 2d 785, 789 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 403 (1983); *United States v. Reed,* 700 F. 2d 638 (11th Cir. 1983); *United States v. Rabinowitz,* 578 F. 2d 910 (2nd Cir. 1978); *United States v. Young,* 567 F. 2d 799, 803 (8th Cir. 1977), *cert. denied,* 434 U.S. 1079 (1978).

> Since Rule 608(b) is intended to be restrictive – and was amended to ensure that it would be restrictively interpreted by trial courts – the inquiry on cross-examination should be limited to these specific modes of conduct which are generally agreed to indicate a lack of truthfulness.

J. Weinstein and M. Berger, *Weinstein's Evidence,* Vol. 3, Section 608[05], at 608-33 (1985 and 1988 Supp.). Of course, the possibility of prejudice is greatest when the witness is the accused.

> It is appropriate to limit attacks on the defendant while permitting freer inquiry against other witnesses. There is substantial danger that the jury will believe that the defendant is a bad man deserving of punishment even if he did not do the particular act charged.

Weinstein's Evidence, at pp. 608-35, (1985 and 1988 Supp.). Also see, *United States v. Kennedy,* 714 F. 2d 968, 973 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1305 (1984); *United States v. Page,* 808 F. 2d 723, 730 (10th Cir. 1987), *cert. denied,* 42 U.S. 918 (1987). Judge Carroll's conclusion that broader cross-examination is allowed against criminal defendants and in cases arising from Indian reservations where people are "unsophisticated" is simply not supported by applicable law.

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6. The Use of a Limiting Instruction Did Not Eliminate the Prejudice.

Although the trial court did little to employ the balancing process required by Rule 403, the trial court did give a limiting instruction. Unfortunately, the limiting instruction simply could not pretend to return a fair trial to Mr. Hadley. In light of the nature and depth of prior misconduct evidence presented against Mr. Hadley, it is silly to believe that the prejudice could be tamed through the use of a limiting instruction. "The virus of the ruling is not so easily extracted." *People v. Zackowitz*, 172 N.E. 466, 468 (1930).

> The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.

Krulewitch v. United States, 336 U.S. 440, 453 (1949) (J. Jackson, concurring). "It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again . . . As a practical matter, prosecutors are aware of the utility of such evidence in securing convictions, and the temptations to introduce such evidence in hope of achieving the prohibited prejudicial effect are undoubtedly great. Ladd, *Credibility Test – Current Trends*, 89 U. Pa. L.

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The evidence relating to Kyle Hartman was too remote in time to reliably establish "intent" on the part of Mr. Hadley. The probative value of the evidence is substantially weakened because of remoteness in time, especially when the evidence is proffered for the purpose of showing "intent". *United States v. Brown*, 873 F. 2d 1265, 1268 n.2 (9th Cir. 1989); *United States v. Fields*, 871 F. 2d 188, 198 (1st Cir. 1989); *United States v. Rubior-Gonzales*, 674 F. 2d 1067, 1075 (5th Cir. 1982).

The trial court unfairly refused to grant a continuance to afford defense counsel an opportunity to investigate Mr. Hartman's damaging accusations. The failure to grant a continuance denied Mr. Hadley of due process of law and a meaningful opportunity to confront and cross-examine Mr. Hartman.

Rev. 166, 190 (1941)." *State v. Newton*, 109 Wash. 2d 69, 743 P. 2d 254, 256-57 (1987).[14]

"[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is too great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). The use of prior, explicit sexual offenses against Mr. Hadley is one of the contexts recognized by this Court.[15]

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[14] The government aggravated the prejudicial nature of prior bad acts by suggesting propensity during closing argument. (R.T., Vol. 9, pp. 1729, 1796-98). The misuse of the evidence denied Mr. Hadley of a fair trial. See, e.g., *Hall v. United States*, 150 U.S. 1003, 1006-07 (1893).

The experience of judicial review and the empirical data from academic studies reveal that limiting instructions do not overcome the prejudicial effect of prior misconduct evidence. "Prior sexual offenses and other heinous crimes can be particularly damming although their logical relation to the crime charged may be tenuous or non-existent." *State v. Newton*, 109 Wash. 2d 69, 743 P. 2d 254, 256, 259 (1987). The unfounded expectations fastened on to limiting instructions requires "a feat of psychological wizardry verg[ing] on the impossible . . . " *United States v. Banmiller*, 310 F. 2d 720, 725 (3rd Cir. 1962); *United States v. Gillespie*, 852 F. 2d 475, 479 (9th Cir. 1988) ("The government's argument that admission of the evidence of homosexuality was harmless because the trial court gave a limiting instruction is unconvincing . . . Under these circumstances the trial court's curative instruction to the jury was not sufficient to obviate the prejudice."); *Government of Virgin Islands v. Toto*, 529 F. 2d 278, 283 (3rd Cir. 1976) (Improper admission of prior conviction was not cured by trial judge's instruction).

> There is reason to doubt the efficacy of any jury instructions, regardless of the care with which it is drafted. Once such evidence is before the jury the damaging prejudicial effect cannot be wiped out by subsequent limitation.

Shotwell, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight"*, 21 U.C.L.A. L. Rev. 892, 913 (1974).

[15] See, e.g., Notes and Comments, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 Yale L. J. 763, 778 (1961) ("Perhaps the most illogical protective device is the jury instruction to use the evidence only in weighing credibility. Observers conclude the order is not obeyed, and a moment's reflection about thought processes raise doubts as to whether it can be obeyed. Yet

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B. THE OFFER TO CONCEDE OR STIPULATE TO THE ISSUE OF INTENT SHOULD BE A RELEVANT FACTOR TO CONSIDER UNDER RULE 403. THE NINTH CIRCUIT EMASCULATED THE BALANCING APPROACH OF RULE 403 BY REFUSING TO EVEN CONSIDER THE PROPOSED STIPULATION OR JUDICIAL ADMISSION.

The opinion of the Court of Appeals for the Ninth Circuit merely states that Mr. Hadley "offered not to argue the issue of intent" (918 F. 2d 848, 851), but Mr. Hadley did more than promise to forego argument on the issue of intent. He unequivocally offered to stipulate that the requisite intent existed. He conceded the issue of "intent" approximately five months before trial. Yet the undisputed issue of "intent" was used as a pretext for admitting massive amounts of prior uncharged misconduct evidence for the purpose of bludgeoning Mr. Hadley into conviction.

The utility of a judicial admission or stipulation is not a novel discovery. They are used broadly in civil litigation and have been used extensively in criminal cases as well.[16] See, *Marshall v. Lunberger*, 459 U.S. 447 (1983) (J. Blackmun, dissenting).

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use of the instruction continues, smoothing over the real question of whether uncontrolled use of such evidence ought to be allowed."); *United States v. Jacangelo*, 281 F. 2d 574, 576 (3rd Cir. 1960) ("[A] ritualistic counsel of psychologically impossible behavior."); Curtin, *Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant – Witness*, 45 Albany L. Rev. 1099, 1110 (1981); Eichorn, *Social Science Findings and the Jury's Ability to Disregard Evidence Under the Federal Rules of Evidence*, 52 Law and Contemp. Prob. 341 (1989); Tanford, Penrod, and Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behav. 319 (1985); Green and Loftus, *When Crimes are Joined at Trial*, 9 Law and Human Behav. 193 (1985); Wissler and Saks, *On the Inefficacy of Limiting Instructions*, 9 Law and Human Behav. 37 (1985); H. Kalven & H. Zeisel, *American Jury* 127-30 (1971); Griswold, *The Long View*, 51 A.B.A. Journal 1017, 1021 (1965).

[16] Where the prosecutor proposes to introduce such evidence to prove the required intent, the defendant may, under the authority of certain cases to be discussed, resort to a judicial admission, stipulating that if the act was done, it was done with the requisite criminal intent (or guilty knowledge). Once this admission has been made,

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The Second Circuit has taken the lead position in breathing true life into the balancing process of Rule 403 by taking pragmatic steps to insure that the government is afforded the opportunity to prove its case with valid and reliable evidence, while simultaneously protecting the accused citizen's right to a fair trial. In order to balance the interests of both parties, the defendant's proffered stipulation must be considered as an important factor under Rule 403 of the Federal Rules of Evidence. Serious consideration must be given to an offer to stipulate under Rule 403 of the Federal Rules of Evidence since it plays the key role in balancing the "inclusionary" provisions of Rule 404(b).

The *Hadley* decision steadfastly refuses to consider the propriety of a stipulation or judicial admission. The rigid position of the Ninth Circuit in *Hadley* simply does not

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proof of the similar acts is unnecessary and therefore prejudicial. And, of course, the only remaining logical connection between similar acts and commission of the act charged is the tendency of the former to show a propensity to crime – a forbidden inference unless the defendant first introduces evidence of his good character. Thus, an admission that if the act was done it was done with the necessary *mens rea* should, logically and fairly, prevent all proof of the similar acts.

• • •

The automatic denial of the right to preclude the introduction of evidence by means of stipulation is the result of a judicial formalism attuned to times and places other than our own. A court which rigidly adheres to such an attitude must soon realize that in so doing it is often allowing the indirect evasion of rules of evidence which, no doubt, it enforces just as rigidly on other occasions. (notes omitted).

Wall, *Judicial Admissions: Their Use in Criminal Trials*, 53 J. Crim. Law, Crimin, and Pol. Sci. 15, 19 and 25-26 (1962).

Allowing stipulations in civil litigation, but refusing to allow them in criminal cases, creates a "classification" triggering the equal protection clause. The differential treatment accorded to criminal defendants by the unfair classification runs afoul of the equal protection guarantee and is, therefore, unconstitutional. See Imwenkerlied, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 Emory L. J. 341 (1991). Of course, Rule 403 should be construed and applied to avoid constitutional problems.

comport with the flexible, balancing process of Rule 403 of the Federal Rules of Evidence. Curiously, the Ninth Circuit has previously required the government to accept appropriate stipulations in criminal cases. *United States v. Shapiro*, 879 F. 2d 468, 470 (9th Cir. 1989); *United States v. Durcan*, 539 F. 2d 29, 30-31 (9th Cir. 1976) ("majority view").

The offer to concede "intent" by Mr. Hadley should have been seriously considered by the trial court as part of its duty to balance the probative value of questioned evidence against its prejudicial effect. See Rule 403, Federal Rules of Evidence. As displayed by the preceding section of this brief, the prior bad acts were not necessary or helpful to an accurate assessment of the guilt or innocence of Mr. Hadley. Since "the intent element appears in the statute simply to negate an assertion of innocent or accidental touching", then the trial court should allow the "defendant to eliminate intent as an issue." Hutton, *Commentary: Prior Sexual Contact With a Child*, 34 S.D.L. Rev. 604, 611, 623-24 (1989).

Of course, the Advisory Committee Notes to Rule 404(b) expressly require that the trial court consider less prejudicial alternatives than prior bad act evidence. At the least, "Rule 403 would appear to make it proper for the court to consider the defendant's offer to stipulate as one element in the balancing required in exercising its discretion to exclude relevant evidence." Wright & Graham, *Federal Practice and Procedure* Sec. 5194 (1978).

We submit that no rigid rule dictating the absolute refusal or acceptance of a defense offer to enter into a stipulation removing an element of the crime should exist. Instead, a careful review of the proposed stipulation should occur within the context of all the evidence in the case with careful attention focused upon the incremental, probative value of the proferred evidence, its prejudicial effect, and the availability of other means of proof.

The positions taken by the *Hadley* decision and the Seventh Circuit reflect the extreme position regarding the use of prior bad acts to establish "specific intent" crimes. We believe that this Court should adopt a sensible, middle ground.

Both the Seventh Circuit and the *Hadley* decision tend to cling to the notion that evidence of prior misconduct is relevant whenever the government must prove a specific intent crime. Both the *Hadley* decision and the Seventh Circuit fail to analyze the complexities of each case and refuse to give true meaning to the balancing test of Rule 403. See, *United States v. Chamison*, 760 F. 2d 798, 805 (7th Cir. 1985). The *Hadley* decision closes its eyes to Rule 403 as well.

To be sure, we do not assert that the accused citizen can remove the issue of "intent" by stipulation in every case. Of course, the government would not be required to accept the stipulation if it impaired the effectiveness of the prosecution's legitimate case. *People v. Villa*, 178 Cal. Rptr. 398, 125 Cal. App. 3d 872 (1981) (The defendant could not preclude the government from admitting evidence of injuries suffered by a rape victim by simply offering to stipulate that the victim suffered great bodily harm.); *United States v. Sampol*, 636 F. 2d 621, 679 (D.C. Cir. 1980) (The government was entitled to use autopsy evidence to show the force of a bomb used in a political assassination in order to establish intent to kill despite the offer of defendants to stipulate that the deaths were caused by bombing. To be sure, the meager stipulation offered by the defendants diluted the force of the proposed evidence.). Each case must be considered on its own merits.

> The effect of adopting this opposite extreme in construing the Rule would be to require a party to accept any stipulation offered by his opponent and thus would allow a party to control the proof presented by his opponent at trial . . . A cold stipulation can deprive a party "of the legitimate moral force of his evidence," . . . and never can fully substitute for tangible, physical evidence or the testimony of witnesses.

United States v. Grassi, 602 F. 2d 1192, 1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980); *United States v. Doherty*, 675 F. Supp. 714, 716-18 (D. Mass. 1987); *United States v. Manner*, 887 F. 2d 317, 321-22 (D.C. Cir. 1989). But, we believe that cases which reject the position of the Second Circuit on a wholesale basis not only unfairly analyze the cases decided, but miss the crux of Rule 403. The questioned

evidence in Mr. Hadley's case consisted completely of extrinsic, uncharged misconduct. The proposed stipulation would not have impaired the effectiveness of the government's case. It would have only eliminated the red herring.

Indeed, the Second Circuit has not adopted an inflexible rule allowing the defendant to remove the issue of "intent" by stipulation in every case.

> Nevertheless, in some circumstances, the nature of a defense put forth by the defendant may reveal that "knowledge and intent, while technically at issue, are not really in dispute." In some cases, the defendant may specifically offer to stipulate to an issue and thereby remove it from the case. [cites omitted].

United States v. Colon, 880 F. 2d 650, 656-57 (2nd Cir. 1989).[17] Indeed, the Second Circuit has expressly refused to allow a "bare stipulation" by the defense when the stipulation might "rob the evidence of much of its fair and legitimate weight." *United States v. Pedroza*, 750 F. 2d 187, 201 (2nd Cir. 1984), *cert. denied*, 107 S. Ct. 151 (1986). Also see, *United States v. Figueroa*, 618 F. 2d 934, 941-42 (2nd Cir. 1980); *United States v. Manafzadeh*, 592 F. 2d 81, 87 (2nd Cir. 1979); *United States v. O'Connor*, 580 F. 2d 38, 41 (2nd Cir. 1978); *United States v. Williams*, 577 F. 2d 188 (2nd Cir. 1978), *cert. denied*, 439 U.S. 868 (1978).

Although the position of the Second Circuit has not been universally accepted, the *Hadley* position stands in less company. For instance, although the Court of Appeals for the Fifth Circuit in *Grassi* ostensibly rejected the position of the Second Circuit; it more clearly rejected the sterile position of the Ninth Circuit in *Hadley*. *Grassi* expressly held that the trial court "has the power to require the government to accept

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[17] The Second Circuit requires that the stipulation "express a decision not to dispute that issue with sufficient clarity that the trial court will be justified (a) in sustaining objection to any subsequent cross-examination or jury argument that seeks to raise the issue and (b) in charging the jury that if they find all the other elements establish beyond a reasonable doubt, they can resolve the issue against the defendant because it is not disputed. *United States v. Ortiz*, 857 F. 2d 900, 903-04 (2nd Cir. 1988), *cert. denied*, 109 S. Ct. 1352 (1989).

a tendered stipulation in whole or in part as well as to permit it to reject the offer to stipulate in its entirety." 602 F. 2d 1192, 1197 (5th Cir. 1979). The trial court should determine the weight to be given to an offer to stipulate in the balancing process employed by Rule 403. *Ibid.*

> The Advisory Committee's Notes on the Proposed Federal Rules of Evidence imply that the Rule 403 weighing process can, in some situations, result in requiring a party to accept his opponent's stipulations. The Note concerning Rule 401 states that evidence can be relevant even if offered on undisputed matters, but proceeds to conclude that "*[w]hile situations will arise which call for the exclusion of evidence offered to prove a point conceded to an opponent*, the ruling should be made on the basis of such considerations as waste of time and undue prejudice . . . ". [original emphasis].

Grassi at 1196-97 n.4 (5th Cir. 1979). *Grassi* has identified the appropriate balancing test to be employed under Rule 403 of the Federal Rules of Evidence. A rigid rule universally accepting or refusing proffered stipulations must be rejected. By refusing to consider Mr. Hadley's stipulation or concession relating to the marginal issue of specific intent, the Court of Appeals for the Ninth Circuit effectively precluded a meaningful balancing process under Rule 403.

The majority of federal decisions correctly conclude, contrary to the Ninth Circuit, that concessions or stipulations must be considered in each case as part of the balancing process of Rule 403.

> Unlike other courts, our circuit has declined to adopt a per se rule either for or against admission of evidence when the defendant offers to stipulate to an element of the offense.
>
> * * *
>
> As a general rule, a party may not preclude his adversary's offer of proof by admission or stipulation. This proposition, however, is qualified by Rule 403 of the Federal Rules of Evidence, which requires that evidence be excluded if its potential for unfair prejudice is substantially outweighed by

> its probative value. The ultimate decision to exclude evidence under Rule 403 is "committed to the sound discretion of the trial court, tempered by the particular facts presented." [citing *Grassi*] . . . An offer to stipulate is one factor that the trial court should consider in making a determination under Rule 403 [cites omitted].

United States v. O'Shea, 724 F. 2d 1514, 1516 (11th Cir. 1984).[18]

We advocate the utilization of the middle ground position taken by most federal courts that have considered the issue carefully over the course of the last few years.

> An offer to stipulate nevertheless remains a salient factor in the weighing process contemplated under Rule 403, as the applicable authorities counsel that the trial court may properly consider the tendered admission "as one element in the balancing required in exercising its discretion". [cites omitted].

City of Cleveland v. Cleveland Elec., etc., 538 F. Supp. 1257, 1265 (N.D. Ohio, 1980). Also see, *United States v. Provenzano*, 620 F. 2d 985, 1003-04 (3rd Cir. 1980); *State v. Berkelman*, 355 N.W. 2d 394, 396-97 (Minn. 1984) (Balancing required); *State v. Maurer*, 150 Ohio St. 3d 239, 473 N.E. 2d 768, 792 (1984) (A proposed stipulation requires a balancing analysis by the trial judge under Rule 403). Although it would be inappropriate to require the government to accept any stipulation proposed by the defendant in every criminal case, the purpose of Rule 403 would fail if proposed stipulations or concessions were not carefully considered and accepted in appropriate cases.

> [T]he party offering the evidence is deprived of an important tactical advantage. Indeed, where the evidence is not relevant to any real issue, the advantage sought to be gained by its presentation must be recognized as unfair. **Each side takes the risk that the "picture" of the case seen by the jury may be an unfavorable decisional context. But neither side is entitled to litigate a non-existent issue for no purpose other than to alter the decisional context in his favor.** [emphasis added].

Albrecht v. Broughton, 85 Cal. Rptr. 659, 662 (Cal. App. 1 Dist. 1970). Indeed, a proposed stipulation, balanced within the parameters of Rule 403, can serve both parties well by providing a fair trial.

Indeed, earlier cases from the Seventh Circuit also recognized the need to consider stipulations under the balancing test of Rule 403.

> The government is not bound to stipulate to such facts unless the prejudicial aspects of the testimony in context outweigh its probative value, although the feasibility of a stipulation and the prosecution's need for the testimony generally should be taken into account by the trial judge in the weighing process. [cites omitted].

United States v. DeJohn, 638 F. 2d 1048, 1053 (7th Cir. 1981).

Obviously, the defendant's decision to stipulate to the issue of "intent" undermines it as a serious issue in the case. See, C. McCormick, *Law of Evidence*, Sec. 190, at 452 n.54 (1987); *United States v. Buckhanon*, 505 F. 2d 1079, 1083 n.1 (8th Cir. 1974). The "presence of a stipulation would have gone far toward" rendering evidence of prior convictions

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[18] As part of the Rule 403 balancing process, the trial court should determine whether or not "intent" was a genuine or contested issue at trial, whether the defendant took affirmative steps to remove the issue of intent from the case by clearly conceding or stipulating to the issue, the relative strength of the government's case on the issue of intent absent the prior bad acts, and whether the government actually needed prior misconduct evidence to establish intent. *United States v. Cardenas*, 895 F. 2d 1338, 1342-45 (11th Cir. 1990).

To be sure, we believe that the Second Circuit, since its leading decision in *United States v. Mohel*, 604 F. 2d 748 (2nd Cir. 1979), has expanded or elaborated on its position to fit within those cases that require a particularized balancing process under Rule 403 in every case. Compare, *United States v. Colon*, 880 F. 2d 650, 656-60 (2nd Cir. 1989).

One commentator has suggested detailed guidelines that a trial court should follow in deciding whether to admit prior bad acts evidence on the question of intent under Rule 404(b). See, Lansverk, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 Wash. L. Rev. 1213, 1236 (1986); Also see, Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604, 617 n.63 (1989).

"unnecessary, unfair, and prejudicial . . . ". *United States v. Timpani*, 665 F. 2d 1, 6 (1st Cir. 1981). The "better reasoned cases" conclude that evidence tending to establish a fact not in dispute is necessarily less relevant than disputed evidence. *People v. Municipal Court, etc.*, 158 Cal. Rptr. 739 (Cal. App. 2 Dist. 1979).

The thoughtful use of judicial admissions or stipulations should not be barred from criminal litigation as dictated by the *Hadley* decision merely because a marginal issue of "specific intent" exists somewhere in the case. Instead, admissions or stipulations may be quite useful in appropriate cases in order to help the trial court balance unfair prejudice against the incremental, probative value of disputed evidence. Mr. Hadley could have received a fair trial if his concessions and offers to stipulate on the issue of "intent" were sincerely considered. A fair balance under Rule 403 would not have adversely affected the ability of the government to establish its case against Mr. Hadley with legitimate evidence. Judicial integrity, intellectual honesty, and a fair trial should all flourish together. Principled guidelines should apply to Rule 403.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed. The judgment, sentence, and conviction of the district court should be set aside and a new trial ordered.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise famous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS

ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n.15 (Fryer ed. 1957). The rule summarizes this relationship as "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more * * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 162, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, " * * * [I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations a waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed

to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. California Evidence Code § 210, defining relevant evidence in terms of tendency to prove a disputed fact.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

The provision that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar

provisions see California Evidence Code §§ 350, 351. Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60-4-7(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and

now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501(c).

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. 8 U.S.C. § 1202(f), records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; 10 U.S.C. § 3693, replacement certificate of honorable discharge from Army not admissible in evidence; 10 U.S.C. § 8693, same as to Air Force; 11 U.S.C. § 25(a)(10), testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; 11 U.S.C. § 205(a), railroad reorganization petition, if dismissed, not admissible in evidence; 11 U.S.C. § 403(a), list of creditors filed with municipal composition plan not an admission; 13 U.S.C. § 9(a), census information confidential, retained copies of reports privileged; 47 U.S.C. § 605, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

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Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

waste of time, or needless presentation of cumulative evidence.

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy – A Conflict in Theory, 5 Van.L.Rev. 385, 392 (1952); McCormick § 152, pp. 319-321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this report following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p.

320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in California Evidence Code § 352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal Law Revision Comm'n Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. [Effective until Dec. 1, 1991. See, also, subd. (b) below.] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) Other crimes, wrongs, or acts. [Effective on Dec. 1, 1991. See, also, subd. (b) above.] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the

general nature of any such evidence it intends to introduce at trial. (As amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting in inference that the person acted on the occasion in question consistently with his character. This use of character is often described

as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character, (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers, L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in

accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 581-583 (1956); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *Id.*, 615:

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases is dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, 41 Iowa L.Rev. 325 (1956).

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

NOTES OF COMMITTEE ON THE JUDICIARY, SENATE REPORT NO. 93-1277

This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

1987 AMENDMENT

The amendments are technical. No substantive change is intended.

1991 AMENDMENT

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, *see, e.g., United States v. McClure*, 546 F.2nd 670 (5th Cir.1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. *See, e.g.*, Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a

reasonable request or disclosure will depend largely on the circumstances of each case. *Compare* Fla.Stat.Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) *with* Tex.R.Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. *Cf.* Fla.Stat.Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supersede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500, et seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule *in limine* on 404(b) evidence before it is offered or even mentioned during trial. When ruling *in limine*, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, *see United States v. Williams*, 900 F.2d 823 (5th Cir.1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. *See United States v. Huddleston*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON 1972 PROPOSED RULES

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'." It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on

occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948); Annot., 47 A.L.R.2d 1258. The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not

generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, *i.e.*, be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

1987 AMENDMENT

The amendment is technical. No substantive change is intended.

TITLE 18
CRIMES AND CRIMINAL PROCEDURE

CHAPTER 109A - SEXUAL ABUSE

Sec.
2241. Aggravated sexual abuse.
2242. Sexual abuse.
2243. Sexual abuse of a minor or ward.
2244. Abusive sexual contact.
2245. Definitions for chapter.

§ 2241. Aggravated sexual abuse

(a) By force or threat. - Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act -

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnaping;

are attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means. - Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly -

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or

permission of that person, a drug, intoxicant, or other similar substance and thereby –

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(c) With children. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(d) State of mind proof requirement. – In a prosecution under subsection (c) of this section, the Government need not prove that the defendant knew that the other person engaging in the sexual act had not attained the age of 12 years.

(Added Pub.L. 99-646, § 87(b), Nov. 19, 1986, 100 Stat. 3620.)

EDITORIAL NOTES

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3660.

Effective Date. Pub.L. 99-646, § 87(c), Nov. 10, 1986, provided that:

"This section and the amendments made by this section [enacting this chapter, amending sections 113(a), (b), 1111(a), 1153, and 3185(12) of this title, sections 300w-3(a)(1)(G), 300w-4(c)(6), and 9511 of Title 42, The Public Health and Welfare, and section 1472(k)(1) of Title 49, Transportation, and repealing chapter 99 (sections 2031 and 2032) of this title shall take effect 30 days after the date of the enactment of this Act [Nov. 10, 1986]."

[Effective Date provision similar to Pub.L 99-646, § 87(c), was enacted by Pub.L. 99-654, § 4, Nov. 14, 1986, 100 Stat. 3664, which was effective 30 days after date of enactment of Pub.L. 99-654, Nov. 14, 1986.]

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly –

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is –

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3621.)

Editorial Notes

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date. Section effective 30 days after Nov. 10, 1986, see section 87(c) of Pub.L. 99-646, set out as a note under section 2241 of this title. See, also, Pub.L. 99-654, § 4, for effective date of 30 days after Nov. 14, 1986.

§ 2243. Sexual abuse of a minor or ward

(a) Of a minor. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who –

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than five years, or both.

(b) Of a ward. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who is –

(1) in official detention; and

(2) under the custodial, supervisory, or disciplinary authority of the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than one year, or both.

(c) Defenses. – (1) In a prosecution under subsection (a) of this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years.

(2) In a prosecution under this section, it is a defense, which the defendant must establish by a preponderance of the evidence, that the persons engaging in the sexual act were at that time married to each other.

(d) State of mind proof requirement. – In a prosecution under subsection (a) of this section, the Government need not prove that the defendant knew –

(1) the age of the other person engaging in the sexual act; or

(2) that the requisite age difference existed between the persons so engaging.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3621.)

Editorial Notes

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date. Section effective 30 days after Nov. 10, 1986, see section 87(c) of Pub.L. 99-646, set out as a note under Section 2241 of this title. See, also Pub.L. 99-654, § 4, for effective date of 30 days after Nov. 14, 1986.

§ 2244. Abusive sexual contact

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if so to do would violate –

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than five years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than one year, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined not more than $5,000, imprisoned not more than six months, or both.

(b) In other circumstances. – Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined not more than $5,000, imprisoned not more than six months, or both.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3622.)

Editorial Notes

Codification. Identical provision was enacted by Pub.L. 99-654, § 2, Nov. 14, 1986, 100 Stat. 3661.

Effective Date. Section effective 30 days after No. 10, 1986, see section 87(c) of Pub.L., 99-646, set out as a note under section 2241 of this title. See, also Pub. L. 99-654, § 4, for effective date of 30 days after No. 14, 1986.

§ 2245. Definitions for chapter

As used in this chapter –

(1) the term "prison" means a correctional, detention, or penal facility;

(2) the term "sexual act" means –

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(C) the penetration, however slight, of the anal or genital opening of another by a hand or

finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; and

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

(4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty;

(5) the term "official detention" means –

(A) detention by a Federal officer or employee, or under the direction of a Federal officer or employee, following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or

(B) custody by a Federal officer or employee, or under the direction of a Federal officer or employee, for purposes incident to any detention described in subparagraph (A) of

this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation;

but does not include supervision or other control (other than custody during specified hours or days) after release on bail, probation, or parole, or after release following a finding of juvenile delinquency.

(Added Pub.L. 99-646, § 87(b), Nov. 10, 1986, 100 Stat. 3622.)

FOR ARGUMENT

Supreme Court, U.S.
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No. 91-6646

In the Supreme Court of the United States

OCTOBER TERM, 1992

VERL HADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, at petitioner's trial on charges that he sexually abused three children, the district court properly admitted testimony that petitioner sexually abused two other children as well.

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United States v. *Dynalectric Co.*, 859 F.2d 1559 (11th Cir. 1988) 35
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United States v. *Hudson*, 884 F.2d 1016 (7th Cir. 1989) 26
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United States v. *Woods*, 613 F.2d 629 (6th Cir.), cert. denied, 446 U.S. 920 (1980) 26

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18 U.S.C. 2241(a)(1) 2, 3, 5
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18 U.S.C. 2244(a)(2) 2, 4, 2a
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Miscellaneous:

Black's Law Dictionary (5th ed. 1979) 24
Kuhns, *The Propensity to Misunderstand the Character of Specific Act Evidence*, 66 Iowa L. Rev. 777 (1981) 28
2 D. Louisell & C. Mueller, *Federal Evidence* (1985) 31
1 J. Strong, *McCormick on Evidence* (4th ed. 1992) 25, 26
J. Weinstein & M. Berger, *Weinstein's Evidence* (1991) 24
1A J. Wigmore, *Evidence* (1983) 25

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-6646

VERL HADLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals, J.A. 173-182, is reported at 918 F.2d 848.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1990. A petition for rehearing was denied on September 9, 1991. The petition for a writ of certiorari was filed on December 9, 1991 (a Monday), and was granted on March 2, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The relevant provisions of the Sexual Abuse Act of 1986, 18 U.S.C. 2241 *et seq.*, and Rules 401, 402, 403, and 404(b) of the Federal Rules of Evidence are set out in the Appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted on two counts of aggravated sexual abuse of Amadee R., a 12-year-old Indian boy, in violation of 18 U.S.C. 2241(a)(1), and on one count of abusive sexual contact with Amadee R., in violation of 18 U.S.C. 2244(a)(2). Petitioner contends that the district court improperly applied the Federal Rules of Evidence in allowing testimony that petitioner committed acts of sexual abuse against other children.

A. The Charges Against Petitioner

In January 1988, the Federal Bureau of Investigation began a probe into allegations of widespread sexual abuse of children on the Navajo Indian Reservation. The FBI interviewed students at the Bureau of Indian Affairs' Chilchinbeto school near Kayenta, Arizona. Tr. 1449-1453. Those interviews implicated petitioner, a 40-year-old Indian who taught at the Chilchinbeto school. A federal grand jury subsequently returned an indictment charging petitioner under the Indian Major Crimes Act, 18 U.S.C. 1153, with 11 counts of sexual abuse involving five Indian boys: Travis Y. (Counts 1-2); Cory K. (Counts 3-6); Amadee R. (Counts 7-9); Jonathan T. (Count 10); and Fernando Y. (Count 11). See J.A. 3-7.

Prior to trial, petitioner moved to sever the counts of the indictment. He argued that a severance should

be granted because he intended to defend against Counts 3 through 6, which charged that he sodomized Cory K., on the ground that the boy consented to the acts. See Supp. Memo. in Support of Motion to Sever Counts of the Superseding Indictment (filed April 21, 1989) (CR 89).[1] The district court elected to sever Counts 1 through 6, which all involved charges of involuntary sodomy under state law and gave rise to the possible defense of consent, from Counts 7 through 11, which all involved what the court called "a touching situation, or a contact situation." J.A. 9, 10, 13. See April 27, 1989, Order (CR 100).

The government went to trial on the latter group of charges. Count 7 charged that petitioner committed aggravated sexual abuse against Amadee R. in violation of 18 U.S.C. 2241(a)(1), which required the government to prove that petitioner sodomized or attempted to sodomize Amadee R. through the use of force. The charge was based on petitioner's actions in taking Amadee home from an indoor swimming pool at the Kayenta High School in October 1987, when the boy was 12 years old. Petitioner allowed Amadee, the sole passenger in petitioner's car, to steer the car while sitting on petitioner's

[1] In his brief in this Court, petitioner spends several pages setting forth the impeachment of Cory K., apparently for the purpose of suggesting that Cory K.'s testimony about having sexual relations with petitioner was fabricated. See Pet. Br. 12-14. That suggestion is inconsistent with his pretrial position in the district court, where he stated that he would defend against the charges of sodomizing Cory K. by arguing that Cory K. consented to the acts of sodomy between them, and where he offered to submit an affidavit to that effect. Pretrial Tr. 91-94 (April 25, 1989); *id.* at 108 (petitioner "would testify that none of the other sexual acts occurred, but with Cory [K.] that there was consensual sexual activity").

lap. While the boy was positioned behind the steering wheel, petitioner told Amadee to pull down his pants. When Amadee did so, petitioner placed his penis in Amadee's anus. Amadee then pulled himself away and insisted that petitioner take him home. See Tr. 537-544.

Count 8 also charged petitioner with aggravated sexual abuse against Amadee R. That charge was based on a similar incident in November 1987, when petitioner again gave Amadee a ride home from the Kayenta High School swimming pool. As on the previous occasion, petitioner allowed Amadee, the sole passenger in petitioner's car, to steer the car while sitting on petitioner's lap. Petitioner tried to get Amadee to remove his pants. When Amadee felt petitioner's penis become erect, he moved to the passenger side of the car and asked to be taken home. See Tr. 544-546.

Count 9 charged that petitioner committed abusive sexual contact against Amadee R. in violation of 18 U.S.C. 2244(a)(2), which required the government to prove that petitioner touched the genitalia of the boy with the intent to arouse or gratify a sexual desire. That charge was based on an incident in February 1988. Petitioner offered to drive Amadee home from the Kayenta High School swimming pool. En route, they stopped at petitioner's trailer home. Petitioner put a videotaped movie on the television set, told Amadee to undress, and rubbed green lotion on the boy's cheek, back, and legs. Petitioner then directed Amadee to pull down his shorts, and petitioner started rubbing lotion on the boy's penis. Tr. 550-554. At that point, Amadee "hurried up and pulled up [his] shorts," got dressed, and told petitioner to take him home. *Ibid.*

Count 10 charged that petitioner molested Jonathan T. in violation of state law, which required the government to prove that petitioner directly touched the private parts of a child less than 15 years old and was motivated by an unnatural or abnormal sexual interest. See Ariz. Rev. Stat. Ann. § 13-1410 (1990): *State* v. *Brooks*, 586 P.2d 1270 (Ariz. 1978). The charge was based on an incident at the Chilchinbeto school where petitioner taught. Jonathan testified that in October 1986, petitioner gave him a pair of pants to replace his torn trousers. Petitioner accompanied Jonathan, who was then 6 years old, to a storage room, where Jonathan changed his clothes. According to Jonathan, petitioner touched Jonathan's penis while he changed. See Tr. 433-438.

Count 11 charged that petitioner committed abusive sexual contact against Fernando Y., in violation of 18 U.S.C. 2244(a)(1), which required the government to show that petitioner touched the genitalia of a child less than 12 years old with the intent to arouse or gratify a sexual desire. That charge also was based on an incident at the Chilchinbeto school. Fernando testified that in May 1988, when he was 10 years old, petitioner approached him from behind while he was urinating in the school restroom. Petitioner pressed his groin against Fernando and touched the boy's chest and penis. See Tr. 389-393.

B. The Admission of Cory K.'s Extrinsic Act Testimony

Prior to trial, when the district court conferred with counsel about severing the counts of the indictment, the question arose whether the government could use the testimony of Travis Y. and Cory K.—the boys identified in severed Counts 1 through 6 as victims of petitioner's nonconsensual sodomy—at the trial on Counts 7 through 11. The trial judge indicated that the testimony would be admissible "as to the intention, motive, plan, whatever, of making these touch-

ings and contacts, and what the context of them were." J.A. 9. He explained that "[t]he touching was leading up to sodomy, i.e., it is relevant, I think, for what the sexual context of it and what [petitioner] would have been touching them about." J.A. 12. The judge stated that "that would be my tentative ruling, subject to whatever occurred during the trial that might suggest to the contrary." J.A. 13.

The jury first heard testimony from each of the alleged victims: 11-year-old Fernando Y. (Tr. 385-427); 9-year-old Jonathan T. (Tr. 428-492); and 13-year-old Amadee R. (Tr. 537-607). The trial judge then revisited the issue of admitting the testimony of Travis Y. and Cory K. concerning petitioner's prior acts of child sodomy (Tr. 656-676). See J.A. 14-25. The government argued that their testimony was relevant and admissible to establish that petitioner's actions with respect to the minor children were sexually motivated and not innocent conduct. J.A. 14-15. The court expressed tentative agreement, indicating that the testimony was relevant to explain petitioner's associations with the victims in the counts being tried—"why [petitioner is] touching these boys and doing these things." J.A. 15.[2]

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[2] The court rejected defense counsel's suggestions that intent and motive were not at issue, stating (J.A. 25):

> You have presented evidence now that would lead the jury to believe that [petitioner], for instance, is dealing with these younger people, taking them home, doing these things, * * * that he was just helping them out, getting them a pair of pants, taking them home, stopping by his house, picking them up, moving them around, that is all —that is intent and motive evidence why he was dealing with them. Isn't it?

See also J.A. 16 ("His acts with these other people, arguably, would tell the jury what his intention was, what his motive

The next day, the judge reaffirmed his ruling that the challenged evidence was admissible; he reiterated his conclusion that petitioner's intent and motive were at issue in the case and that the testimony of Travis Y. and Cory K. "would be relevant in the jury's consideration." J.A. 26-27.[3] The judge then noted that the admission of the testimony was subject to Rule 403, Fed. R. Evid., which provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of "unfair prejudice." J.A. 27. He indicated that he would "screen or sanitize" the testimony "as much as possible" so that the "gross nature of the other acts simply wouldn't be so prejudicial as to inflame the jury." J.A. 28. Petitioner's counsel inquired whether petitioner could enter into a stipulation to avoid the introduction of the testimony. J.A. 30.[4] The judge stated that he would not require the government to enter into such a stipulation, and the

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was, why he was doing these things with these three victims, alleg[ed] victims, that we are discussing.").

[3] The judge noted that the offenses required a showing of intent (J.A. 26) and that defense counsel himself had raised questions of intent through cross-examination "having to do with [petitioner's] interest in children, his willingness to help, in a sense his neighborliness or school teaching character, the suggestion that the lotion involving Amadee R[.] was simply a post swimming skin tone, things like that [which] are all there before the jury and have been put in for that purpose." J.A. 28.

[4] Counsel asked, "What if we stipulated that if the private parts of [Amadee R., Jonathan T., and Fernando Y.] were in fact touched, that it was with a sexual intent? And then simply have the issue about whether or not it occurred go to the jury. And that way we would officially eliminate the issue." J.A. 30.

prosecutor indicated that he was not interested in doing so. *Ibid.* See also Tr. 856-857.[5]

Several days later, petitioner's counsel renewed his offer to stipulate to intent. See Tr. 864-865, 877-878. The trial judge observed that counsel was not offering to stipulate to what was central in Cory K.'s testimony—that petitioner had previously had sex with children. Tr. 878. Rather, petitioner's counsel offered to stipulate only that to the extent that "any of the acts that are alleged in the indictment * * * occurred, that they occurred, because of the intent required by the statute and for purposes of sexual gratification." J.A. 33. The judge ruled that Cory K.'s testimony was admissible and that the government was not required to accept the proposed stipulation as a substitute. J.A. 35.[6]

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[5] The judge also noted that he would need to make a preliminary determination that there was "clear and convincing" evidence that the "other acts" occurred. See J.A. 27-28, 28-29; see also Tr. 691-700. Later that day, the judge heard the testimony of Cory K. and Travis Y. outside the presence of the jury for that purpose. See Tr. 691-700, 772-857. Cory K. testified that petitioner had sexually abused him, Tr. 773-781, but Travis Y. denied having sexual relations with petitioner, Tr. 817-822, and the government did not pursue further the use of Travis Y.'s testimony, Tr. 869-870. After he conducted the hearing, the judge discovered that a "clear and convincing" showing is unnecessary. Tr. 862-863. See *Huddleston* v. *United States*, 485 U.S. 681 (1988).

[6] The judge first concluded, in accordance with Rules 401, 402, and 404(b), Fed. R. Evid., that the evidence was relevant and admissible for a proper purpose:

> [T]he evidence with respect to prior bad acts involving, in this instance, [Cory K.] are relevant, the evidence goes to the motive and intent of [petitioner], as well as whether there were any particular plans or preparations having to do with his conduct in these kind of activities and whether that, in this instance or these instances before the jury, were similar to those on other occasions.

J.A. 35. The judge then ruled, in accordance with Rule 403, Fed. R. Evid., that the probative value of the evidence was not outweighed by the danger of unfair prejudice:

> The evidence having to do with prior bad acts, how they were allegedly undertaken and carried out, the probative value of that evidence outweighs any unfair prejudice to the defendant. There is a similarity of the acts. The considerations reflected in *Huddleston* [v. *United States*, 485 U.S. 681 (1988)], that evidence could also be considered as corroborative of the testimony of other witnesses.

J.A. 35. The court observed that the stipulations proposed by petitioner's counsel would not serve as an adequate substitute for the testimony. *Ibid.*

The government then called Cory K. to the witness stand and the judge gave the jury a cautionary instruction on the use of his testimony. J.A. 74-75. Cory, who was then 19 years old, testified that when he was 12 he had sexual relations with petitioner. *Ibid.* He stated that petitioner had anally sodomized him between ten and 20 times at petitioner's trailer home. J.A. 76. Cory recounted a specific incident that occurred on September 5, 1985. Petitioner drove Cory from a local market to petitioner's home, put a videotaped movie on television, applied Aloe lotion to both of them, and then had anal intercourse with the boy in various positions, including while the boy was seated on petitioner's lap. J.A. 78-80. Cory also testified that in other instances, petitioner usually picked him up in petitioner's car, they were always alone, and petitioner always used lotion. J.A. 84-85.

C. The Admission of Kyle Hartman's Extrinsic Act Testimony

Petitioner's principal defense was that the FBI had manipulated and coerced the child victims into falsely accusing petitioner. See Pet. Br. 20; J.A. 15. Petitioner's counsel contended in his opening statement that the FBI was under intense pressure to solve a case that had generated widespread publicity and that FBI agents had induced the children through suggestive and manipulative interview techniques to implicate petitioner falsely. See Tr. 344-351. Petitioner argued that FBI agents did not find victims, but "created them" to satisfy their superiors. *Ibid.* Later, during cross-examination of the child victims, petitioner repeatedly sought to suggest that FBI agents had coerced the children into implicating him. See Tr. 404-405, 451, 574-576.

Petitioner testified in his own defense. Tr. 1262-1393. He first addressed the charges that he had fondled Fernando Y. and Jonathan T. at the Chilchinbeto school. Petitioner testified that he was absent from the school virtually the entire month of May 1988, and he denied that he had any contact with Fernando Y. in the school restroom. Tr. 1268-1269. Petitioner recalled the day that Jonathan T. had torn his trousers. He testified that he and Jonathan went to a storage room to find a pair of sweat pants that Jonathan could wear. Tr. 1271-1274. Petitioner testified, however, that Jonathan changed his pants out of petitioner's presence and that petitioner did not touch Jonathan. Tr. 1274, 1275-1278.

Petitioner also testified concerning the charges that he had sexual contact with Amadee R. Petitioner stated that he had organized after-school field trips to the Kayenta High School swimming pool to motivate classroom performance. Tr. 1280, 1282.

He explained that Amadee R. was one of his students who had participated in the swimming trips and was also one of his Indian clan members. Tr. 1281-1283. Petitioner stated that he drove Amadee home from the swimming outings and generally treated him as a nephew, explaining that teachers sometimes "take certain students and we extend our personal selves beyond the teacher-student relationship." Tr. 1285. Petitioner testified that on one occasion when returning from a swimming outing, he had allowed Amadee to sit on his lap and steer the car, but petitioner claimed there was no sexual contact between them. Tr. 1287-1289. Petitioner acknowledged giving Amadee a ride home on February 1, 1988, but he denied taking Amadee to his trailer on that date. Tr. 1291-1292.

Petitioner acknowledged that he did "know of" Cory K., that he had allowed the boy to sleep over at his house one night, and that the boy "may have" been at his residence on other occasions. Tr. 1294-1295. But petitioner disputed Cory K.'s testimony and denied that they had ever had sexual relations. Tr. 1295, 1326. Petitioner testified that he had a drinking problem at the time, but that during the period from 1984 to 1985 he did not "ever have sexual relationships with other minors." Tr. 1326.

On cross-examination, petitioner admitted that he had a reputation for tickling male students "in a playful manner, or if I am instructing in a classroom," and he expressed the view that such contact is appropriate "outside on the playground." J.A. 41-42. After initially denying that he let minors other than Amadee R. drive his car, petitioner admitted that he had received a traffic citation in 1976 for allowing a 13-year-old boy, who was "[m]ost likely" a student at the school where petitioner taught, to drive peti-

tioner's car while sitting on petitioner's lap. J.A. 42-43, 44-45; Tr. 1353, 1356-1357. When asked, "[I]s it your testimony here today that you have never had sexual intercourse with any minor males?" petitioner replied, "That's correct." J.A. 125.

On rebuttal, an FBI agent testified that petitioner had admitted in an interview that there was a "definite possibility" that he had sodomized Cory K., but that he was not sure because he was drinking heavily during that period. Tr. 1460-1462. In addition, the prosecutor informed the court that FBI agents in Colorado had recently interviewed an adult male named Kyle Hartman. Hartman had told the agents that petitioner had sodomized him when Hartman was a fifth-grade student. J.A. 48. The prosecutor subsequently sought to use Hartman's testimony to challenge petitioner's defense that the charges against petitioner were the product of FBI coercion and to rebut petitioner's testimony that petitioner had a strictly benevolent relationship with the child victims and had never had intercourse with any minor males. J.A. 58-60. Over the objection of petitioner's counsel, the trial judge agreed to allow the testimony. J.A. 69-71.[7]

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[7] The judge heard Kyle Hartman's testimony outside the presence of the jury before making his ruling. See Tr. 1608-1625. The judge explained that he would admit Hartman's testimony "because [petitioner] took the stand and testified and, in carefully phrased questions on direct, with respect to time frames and other matters, denied that he had ever had sexual relations i.e. any intention in effect to do those kind of things, any plan, any practice of doing those things, denied having minors in his home, denied any kind of activities similar to this." J.A. 69-70. The judge also noted that the government was severely limited by the nature of the evidence in this case: it involved young Indian victims who were unsophisticated and reluctant to testify, and the "opportunities to confuse witnesses, to confuse issues, [was] simply overwhelming." J.A. 70. Finally, the court noted that Hartman's testimony also involved petitioner "in his position as a teacher or a teacher's aid dealing with young students who are there." *Ibid.*

Kyle Hartman, who was 27 years old, testified that when he was a fourth grade student he had met petitioner, who was a teacher's aide at an elementary school in Kayenta. J.A. 125-126. The judge gave the jury a limiting instruction similar to the one preceding Cory K.'s testimony. J.A. 127. Hartman then testified that, beginning in 1971 or 1972, when Hartman was about ten years old, petitioner had sexually abused him. J.A. 128. The first episode occurred when petitioner invited Hartman to petitioner's trailer home and directed the boy to put on petitioner's swimming trunks. Petitioner tickled and wrestled with Hartman and then grabbed the boy's penis. J.A. 128-129. About one year later, petitioner anally sodomized Hartman at petitioner's trailer. J.A. 129. On two subsequent occasions, about one year apart, petitioner visited Hartman at Hartman's home and anally sodomized the boy. J.A. 129-130.

D. The Court of Appeals' Affirmance of Petitioner's Conviction

The jury found petitioner guilty on Counts 7, 8, and 9, charging him with aggravated sexual abuse of and abusive sexual contact with Amadee R., but it acquitted him on Count 10, charging him with molesting Jonathan T., and on Count 11, charging him with abusive sexual contact with Fernando Y. The court of appeals affirmed the convictions, rejecting petitioner's objections to the admission of the

testimony of Cory K. and Kyle Hartman. J.A. 173-182.

The court of appeals stated that extrinsic act evidence is admissible if there is sufficient proof that the defendant committed the acts, if the acts are not too remote in time, and if the acts are admitted to prove a material fact. J.A. 175. Furthermore, when intent is at issue, the other acts must be similar to the charged offense. *Ibid.* The court held that the testimony of Cory K. and Kyle Hartman was sufficiently detailed to allow the jury to conclude that petitioner committed the acts of sexual abuse. J.A. 176. It also held that in light of the similarity between the charged offenses and the acts to which Hartman testified, the acts that Hartman related were not unduly remote in time. *Ibid.* The court concluded that the other acts were properly offered to prove a material fact, because the abusive sexual contact offense required proof of specific intent, and the other acts evidence was sufficiently similar to the charged offenses to warrant admission on an intent theory. J.A. 176-177.

The court rejected petitioner's argument that because petitioner's defense was nonparticipation in the charged offenses, intent was not an issue in the case. The court explained that petitioner's choice of defenses did not relieve the government from having to prove intent and did not bar the government from proving intent by evidence of other acts. J.A. 177-178. Finally, the court held that the probative value of the other acts evidence was not outweighed by the danger of unfair prejudice. The court emphasized that the evidence was highly probative of petitioner's intent and that any potential for unfair prejudice was cured by the court's jury instructions. J.A. 178-179.

SUMMARY OF ARGUMENT

The Federal Rules of Evidence allow admission of extrinsic act evidence at trial if the evidence is relevant, if it is not introduced for an improper purpose, and if its probative value is not substantially outweighed by the danger of unfair prejudice. When the government prosecutes a criminal offense, it may introduce evidence that the defendant previously committed a similar offense if the government satisfies those three criteria. The government properly introduced such evidence in this case.

A. The testimony of Cory K. and Kyle Hartman was relevant because it assisted the jury in determining facts of consequence at trial. See Fed. R. Evid. 401. Petitioner was indicted on charges that he sexually abused adolescent boys, and the government was obligated to prove those charges beyond a reasonable doubt. Petitioner's physical acts and his mental state were facts of central consequence. Cory K. and Kyle Hartman testified that petitioner had sexually abused them when they were adolescent boys. That testimony supported the government's theory that petitioner was someone who engaged in the unusual conduct involved here, that petitioner's specific, arguably innocent acts (such as placing a boy on his lap or applying lotion to the boy's body) were a prelude to sexual activity, and that petitioner associated with the child victims because he viewed them as a source of sexual pleasure. The testimony from Cory K. and Kyle Hartman also served to rebut petitioner's defense that FBI agents had coerced and manipulated the child victims to testify against petitioner.

B. The testimony of Cory K. and Kyle Hartman was not admitted for an improper purpose. Extrinsic act evidence may not be introduced if it is to be used

"to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404 (b). The Rule does not prohibit the government from using extrinsic act evidence for any other purpose, such as to demonstrate that a person has engaged in a distinctive pattern of behavior and to draw non-character-based inferences from that pattern of past behavior concerning the person's acts and mental state on the specific occasion in question. The testimony from Cory K. and Kyle Hartman did not violate Rule 404(b), because that evidence was not admitted to enable the jury to draw character-based inferences from the extrinsic acts.

C. The probative value of Cory K.'s and Kyle Hartman's testimony was not substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. As the district court and the court of appeals recognized, the testimony was highly probative because the witnesses related specific instances of sexual abuse that were very similar to the charges at trial. The testimony of those two adults was especially probative in light of the difficulties the government faced in proving that sexual offenses had been committed against the inarticulate child victims in this case. Petitioner's offer to stipulate that if he sexually abused the children he did so for sexual pleasure was an inadequate substitute for the testimony; the government was therefore entitled to insist on presenting the evidence rather than settling for the proposed stipulation. Finally, the trial court effectively eliminated any danger of unfair prejudice through limitations on the scope of the testimony and through jury instructions that, if anything, were overly restrictive in the limitations they placed on the jury's use of the testimony.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED TESTIMONY THAT PETITIONER HAD ENGAGED IN OTHER ACTS OF SEXUAL ABUSE OF CHILDREN

The Federal Rules of Evidence were designed "to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. A central theme of the Rules is that the factfinder ascertains the truth through the evaluation of relevant evidence. As this Court has explained:

> Rules 401 and 402 establish the broad principle that relevant evidence—evidence that makes the existence of any fact at issue more or less probable—is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter rules do not flatly prohibit the introduction of such evidence, but instead limit the purpose for which it may be introduced.

Huddleston v. *United States*, 485 U.S. 681, 687 (1988). The trial judge properly admitted the testimony of Cory K. and Kyle Hartman pursuant to those Rules. The testimony was relevant, it was not admitted for an improper purpose, and its probative value outweighed any danger of unfair prejudice.

A. The Testimony Was Relevant

Rule 402 of the Federal Rules of Evidence states a fundamental principle to guide the admission of evidence at trial: "All relevant evidence is admissible, except as provided by the Constitution of the United

States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence may be relevant even if its probative value is limited. As this Court has repeatedly stated, "Individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Huddleston*, 485 U.S. at 691; *Bourjaily* v. *United States*, 483 U.S. 171, 179-180 (1987).

As this Court has explained, relevance "is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." *Huddleston*, 485 U.S. at 689 (internal quotation marks omitted). "Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand." Fed. R. Evid. 401 advisory committee's note. Thus, in applying Rules 401 and 402, a court must first identify what facts are of consequence at trial and then determine whether the offered evidence tends to make those facts more or less probable.

1. In a criminal prosecution, the government's charge that the defendant committed the alleged offense identifies the matters the government must prove at trial. A defendant's plea of not guilty "puts the prosecution to its proof as to all elements of the crime charged." *Estelle* v. *McGuire*, 112 S. Ct. 475, 481 (1991); *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988).

Petitioner pleaded not guilty to all the counts of the indictment. The government was therefore obligated to prove all the elements of the offenses charged in Counts 7 through 11. Counts 7 and 8 required the government to prove beyond a reasonable doubt that petitioner engaged in or attempted to engage in a sexual act with the identified child, while Counts 9, 10, and 11 required the government to prove beyond a reasonable doubt that petitioner physically touched the identified child with a sexual motivation or intent. As the charges made clear, petitioner's physical acts and his state of mind in committing those acts were facts of central consequence at trial.[8]

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[8] Petitioner's contention that intent "was not a contested issue" (Pet. Br. 29) is inaccurate. The trial judge noted repeatedly that the issue of intent was important to determining whether petitioner unlawfully touched the boys and attempted to do so, or whether his dealings with them were entirely benevolent, as petitioner asserted. See J.A. 15, 16, 25, 26, 28, 46; see also J.A. 176-178. In any event, a fact need not be contested to be a "fact that is of consequence to the determination of the action." Fed. R. Evid. 401. As the Rules Advisory Committee explained:

> The fact to which evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute.

Fed. R. Evid. 401 advisory committee's note. The trial judge correctly recognized (J.A. 9, 15, 22, 23, 46) that the government was entitled to demonstrate petitioner's state of mind—including the intentions that motivated his action—as evidence that he attempted to sodomize Amadee R. (Counts 7 and 8) and had sexual contact wtih Amadee R., Jonathan T.,

2. As is commonly true in cases involving sexual abuse of children, the government had no witnesses to the charged offenses other than the child victims themselves. In making its evidentiary presentation, the government relied on the children's description of petitioner's acts to establish petitioner's physical contacts and to allow inferences concerning petitioner's state of mind. In addition, the government introduced evidence—the testimony of Cory K.—that petitioner had previously engaged in similar sexual acts with a boy of similar age with whom petitioner associated in similar circumstances. Cory K.'s testimony was relevant because it had a tendency to make the existence of facts of consequence to the determination of the action more probable than it would be without the evidence. Fed. R. Evid. 401.

Cory K.'s testimony was relevant to the question whether petitioner had physical contact with Amadee R., because it related conduct by petitioner that was very similar to conduct reported by Amadee R. in his testimony. Without Cory K.'s testimony, the jury might have doubted the testimony of Amadee R. in part on the ground that the conduct he reported was so aberrant that the jury would be tempted to believe that Amadee R. made it up.[9] Cory K.'s testimony,

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and Fernando Y. (Counts 9, 10, and 11). See *Estelle* v. *McGuire*, 112 S. Ct. at 481 ("the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense").

[9] See *State* v. *Edward Charles L.*, 398 S.E.2d 123, 132-133 (W. Va. 1990):

> [T]hese cases generally pit the child's credibility against an adult's credibility and often times an adult family member's credibility. Since sexual abuse committed against children is such an aberrant behavior, most people find it easier to dismiss the child's testimony as being coached or made up or conclude that any touching of a child's private parts by an adult must have been by accident.

however, established that petitioner engaged in strikingly similar conduct with him, involving anal intercourse, the use of Aloe lotion, and the showing of videotaped movies at petitioner's trailer. A jury that might have supposed one such report of such conduct to be fabricated would be much less likely to assume that two witnesses independently made up such a story. The trial judge therefore properly relied on the distinctive nature of the similar acts in finding them relevant. See J.A. 26-27, 30, 35.

Cory K.'s testimony was also relevant to the issue of petitioner's state of mind with respect to his conduct toward the boys. As this Court has explained, extrinsic act evidence is especially pertinent when the issue "involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston*, 485 U.S. at 685. In this case, the government was required to prove that the touchings were not innocent or incidental, but that petitioner touched the children for sexual gratification. Cory K.'s testimony established that petitioner obtained sexual gratification from having sexual relations with young boys. The testimony therefore made it more probable that petitioner's acts, such as placing Amadee R. on his lap or applying lotion to Amadee's body, were not innocent or incidental, but were a prelude to sodomy. In admitting the testimony, the trial judge properly relied on that theory of relevance as well. See J.A. 12, 27, 28, 30, 35.

Finally, Cory K.'s testimony was relevant because it assisted the jury in understanding the motivations

that prompted petitioner's more general association with the children in this case. The government's theory at trial was that petitioner associated with children because they provided him with a potential source of sexual pleasure, and not because he took a benevolent interest in their welfare. Cory K.'s testimony supported the inference that petitioner's activities with the children—such as giving Amadee R. rides and providing Jonahan T. with a pair of pants —were not motivated merely by generosity and goodwill, as petitioner claimed. In admitting Cory K.'s testimony, the trial judge properly relied on that rationale. See J.A. 9, 12, 15-16, 22, 23, 25, 28, 35.

3. The government called Kyle Hartman as a rebuttal witness. Hartman testified that during a five-year period beginning when Hartman was ten years old, petitioner anally sodomized him on several occasions. Hartman's testimony was relevant to rebut petitioner's defense, raised in his counsel's opening statement, that the government had fabricated the testimony against him, and to rebut petitioner's explanation of his acts and mental state. See J.A. 58, 59-60.

Petitioner's counsel contended in his opening statement that the FBI had pressured the victims in this case to fabricate accusations of sexual abuse in response to a recent "frenzy about finding, identifying, prosecuting, and punishing teachers on the Navajo Indian Reservation that are molesting children." Tr. 345. The government was entitled to answer that assertion. The 27-year-old Hartman's testimony concerning sexual abuse was relevant, because it corroborated the testimony of the victims in this case and effectively repudiated petitioner's contentions that the government "created" victims (Tr. 346) by coercing and manipulating young children. Hartman's testimony was additionally relevant because he lived outside the Kayenta community, and he described instances of petitioner's sexual abuse that occurred long before the FBI supposedly came under "severe pressure" (*Ibid.*) to solve the child abuse problem there.

Hartman's testimony was also relevant to rebut petitioner's testimony concerning his relationships with children, including his relationships with the child victims in this case. Petitioner testified on direct examination that he had only benevolent, nonsexual relations with the child victims, Tr. 1271-1278, 1281-1292, that he did not have a sexual relationship with Cory K., Tr. 1294-1295, 1326, and that during the period in 1984 through 1985, when petitioner had a "drinking problem," he did not "ever have sexual relationships with other minors," Tr. 1326.[10] The government was entitled to rebut petitioner's testimony on those subjects. In addition, Hartman's testimony was relevant for the same reasons that Cory K.'s testimony was relevant—it indicated that petitioner had engaged in the distinctive conduct al-

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[10] Petitioner's counsel objected when the prosecutor asked on cross-examination, "And do I understand your testimony to be that you have never engaged in any sexual acts with minors?" J.A. 123. The judge correctly ruled, however, that the question was within the scope of petitioner's direct testimony. J.A. 123-125; see Fed. R. Evid. 611(b). As the judge noted later in the proceedings, petitioner's testimony on direct examination was designed to give the impression that he was denying that he had ever had sexual relations with minors, although the denial was actually more limited. See J.A. 69-70 (finding that petitioner testified "in carefully phrased questions on direct, with respect to time frames and other matters, denied that he had ever had sexual relations, * * * denied having minors in his home, denied any kind of activities similar to this").

leged, it showed petitioner's state of mind in touching children, and it explained why petitioner associated with children. See J.A. 57, 58, 69-70.[11]

B. The Testimony Was Not Admitted For An Improper Purpose

1. Evidence is excludible if it is offered for an improper purpose. Rule 404(b) prohibits the admission of evidence offered for one such purpose: "to prove the character of a person in order to show action in conformity therewith." The Rule, however, does not limit the introduction of extrinsic act evidence for any other purpose. Indeed, Rule 404(b) was crafted to ensure "that restrictions would not be placed on the admission of such evidence." *Huddleston*, 485 U.S. at 688-689. As one leading treatise puts it, "Only one series of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely than men generally to have committed the act in question." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[08], at 404-52 (1991).

Significantly, Rule 404(b)'s prohibition on the use of extrinsic act evidence is limited to proof of "character," a term that describes the "moral qualities which belong to and distinguish an individual person." *Black's Law Dictionary* 211 (5th ed. 1979);

[11] Petitioner argued at trial that the court should have excluded Hartman's testimony because Rule 608(b), Fed. R. Evid., prohibits the impeachment of a witness's credibility by extrinsic evidence. Hartman's testimony, however, did not merely impeach petitioner's veracity, but was directly relevant to facts of consequence at trial. Rule 608(b) does not prohibit the admission of extrinsic evidence in that circumstance. See *United States* v. *Abel*, 469 U.S. 45, 55-56 (1984).

see also 1A J. Wigmore, *Evidence* § 52, at 1148 (1983) (defining character, for relevancy analysis, as "the actual moral or psychical disposition or sum of traits"); 1 J. Strong, *McCormick on Evidence* § 195, at 825 (4th ed. 1992) ("Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness.").

Rule 404(b) "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character." *Huddleston*, 485 U.S. at 687. Thus, if extrinsic act evidence is offered to prove a person's moral qualities in order to draw inferences about how he behaved on a particular occasion, the evidence is inadmissible.[12] If the evidence is offered for a purpose that does not depend on an inference from his character, however, Rule 404(b) does not bar the admission of the evidence. See *Huddleston*, 485 U.S. at 688 ("If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.").

[12] The Advisory Committee's notes on Rule 404 recite several reasons for the limitation on the use of "character evidence":

> "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Fed. R. Evid. 404(a) advisory committee's note (citation omitted). Rule 404(b) is a "specialized but important application of the general rule excluding circumstantial use of character evidence." Fed. R. Evid. 404(b) advisory committee's note.

Because it bars only inferences from character, Rule 404(b) does not prevent the government from offering proof of extrinsic acts to show that a person has engaged in a pattern of distinctive behavior that includes the conduct with which he is charged. That pattern of conduct may reflect the person's modus operandi, be part of a plan of criminal activity, or otherwise distinctively associate him with particular criminal activity. 1 J. Strong, *McCormick on Evidence*, *supra*, § 190. As long as the chain of inferences from the evidence in question to the fact to be proved does not require the factfinder to make a judgment about the person's general character traits, such as his dishonesty, his violent nature, or his disregard for the law, Rule 404(b) does not bar the use of the evidence. See *Huddleston*, 485 U.S. at 687.

For example, if a person who had sexually abused children were charged with robbing a bank and taking hostages, Rule 404(b) would prohibit the government from introducing evidence of his past instances of child abuse to prove that the person had a criminal disposition and therefore was more likely to have committed the robbery. See J.A. 27. But Rule 404(b) would not prohibit the government from introducing evidence that the person had previously committed a series of bank robberies in which he had taken hostages, and drawing an inference—without reference to the person's character—that a person who had engaged in that unusual and distinctive pattern of conduct in the past did so on the particular occasion in question. See, *e.g.*, *United States* v. *Haney*, 914 F.2d 602, 607 (4th Cir. 1990); *United States* v. *Hudson*, 884 F.2d 1016, 1021-1022 (7th Cir. 1989); *United States* v. *Woods*, 613 F.2d 629, 635 (6th Cir.), cert. denied, 446 U.S. 920 (1980).

Two additional examples may further illustrate the point. Suppose that in a prosecution for bank robbery the government proved that the robber whistled a particular tune during the robbery. The government clearly would be permitted to introduce evidence that in the course of two prior bank robberies, the defendant had been heard whistling the same tune. The evidence would be relevant not because of any character-based inference, but because the pattern of conduct was so similar that it makes it substantially more likely that the defendant was the person who committed the charged robbery.

The result would be the same if the robber gratuitously shot one of the tellers before leaving the bank, and the prosecution could show that the defendant had shot a teller before leaving the bank during two earlier bank robberies. The extrinsic act evidence in the second example obviously carries a much greater weight of moral opprobrium than the extrinsic act evidence in the first example, but the evidence is no less relevant. The evidence in the second example, like the evidence in the first, is not excludible under Rule 404(b), since it is not being offered to prove a character-based trait in order to show that the defendant committed the robbery. That is, the jury is not being asked to conclude that the defendant probably committed the charged bank robbery because he is an evil person; instead, the evidence is logically relevant because the similarities in the robberies makes it more likely that the person who committed the two prior robberies committed the charged robbery as well.[13]

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[13] It is possible, of course, to define "character" so expansively as to include cases such as those in the hypothetical examples: the practice of taking hostages during bank rob-

2. Rule 404(b) does not bar the admission of extrinsic act evidence of the sort introduced in this case. The testimony of Cory K. and Kyle Hartman was relevant for purposes other than to demonstrate petitioner's character and to ask the jury to draw character-based inferences. The prior instances of child sexual abuse were relevant to prove that petitioner engaged in the charged acts and that he did so for sexual purposes, without regard to the moral content of those acts or the way in which those acts might be deemed to reflect on petitioner's character. Rule 404(b) therefore imposed no prohibition on the use of that evidence.[14]

To be sure, Cory K.'s and Kyle Hartman's testimony suggested that petitioner had moral shortcomings. But the mere fact that the evidence may have reflected badly on petitioner's character did not mean that the evidence could not be admitted for a different, proper purpose. As this Court has explained, "there is no rule of evidence which provides that testi-

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beries could be said to be a "character trait," as could the practice of whistling a particular tune during a robbery or shooting a teller before leaving the scene of a bank robbery. But courts have generally confined the notion of "character," for purposes of the admissibility of "similar act" evidence, to general moral qualities, which have limited relevance to the commission of particular illegal acts. See Kuhns, *The Propensity to Misunderstand the Character of Specific Act Evidence*, 66 Iowa L. Rev. 777 (1981).

[14] Petitioner labels Cory K.'s and Kyle Hartman's testimony as "propensity" evidence and suggests that it is therefore inadmissible. See, *e.g.*, Pet. Br. 17, 39 n.13, 41 n.14. Rule 404(b), however, limits the use of extrinsic act evidence to prove "character"—not "propensity." The prosecutor did not use the testimony to draw character-based inferences, and petitioner's arguments based on "propensity" depart from the specific language of the Rule.

mony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." *Abel*, 469 U.S. at 56. It is possible, of course, that a jury could misuse the evidence by drawing character inferences based on a pattern of immoral conduct. But Rule 404(b) does not address that problem. As we explain below, the Federal Rules of Evidence provide other mechanisms to deal with that concern. See *Huddleston*, 485 U.S. at 691. Fed. R. Evid. 404(b) advisory committee's note.

C. The Probative Value Of The Testimony Was Not Substantially Outweighed By The Danger Of Unfair Prejudice

Rule 403 states that relevant evidence, admitted for a proper purpose, may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403.[15] "'Undue prejudice' withir its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note. Petitioner's principal contention (Pet. Br. 20-41) is that the trial judge erred in applying Rule 403 and that the court should have excluded the testimony of Cory K. and Kyle Hartman under that Rule. The court of appeals, however, noted that the decision whether to exclude evidence under Rule 403 is subject to the district court's discretion, and it correctly

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[15] Rule 403 also provides that relevant evidence may be excluded if it "is substantially outweighed by the danger of * * * confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

held that the trial judge did not abuse his discretion in this case. J.A. 178-179.

1. The people of the United States have decided to place their confidence in a jury of ordinary citizens to determine whether an accused has committed a crime. See U.S. Const. Art. III, § 2, Cl. 3; Amend. VI. That decision expresses a belief that jurors properly apprised of relevant evidence can determine facts accurately through the application of logic and their own experience. In accordance with that belief, it is vitally important that the jury have broad access to probative evidence. If the jury is denied access to such evidence without good cause, its truth-finding function—and public confidence in the criminal justice system—will suffer. See *United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."); *Nix* v. *Williams*, 467 U.S. 431, 443 (1984) (noting the "public interest in having juries receive all probative evidence of a crime"); *Taylor* v. *Illinois*, 484 U.S. 400, 411-412 (1988) (noting the "broader public interest in a full and truthful disclosure of critical facts" to the jury).

There is little room to dispute that the testimony of Cory K. and Kyle Hartman was relevant to the question whether petitioner engaged in the charged acts with the requisite mental state. As we have explained, the government's theory at trial was that petitioner used his position as a teacher to foster the trust of young boys and then sexually abuse them. The testimony of Cory K. and Kyle Hartman demonstrated that petitioner had previously engaged in the same distinctive and unusual behavior. As both the trial judge and the court of appeals recognized, that

testimony had substantial probative value because the specific incidents the witnesses related were very similar to the charges at trial. See J.A. 35, 70, 176-178.

At the time of the incidents they described, Cory K. and Kyle Hartman,—like Amadee R., Jonathan T., and Fernando Y.—were pre-teenage boys who attended school in the Kayenta area. In Kyle Hartman's case, petitioner established a relationship with the boy through his position as a teacher's aide. In the case of both Cory K. and Kyle Hartman, petitioner took the boys to his trailer home, where he performed the same sexual acts—genital touching and anal sodomy—that were charged in the indictment. Petitioner's preparatory actions in the case of Cory K., such as putting on a videotaped movie and applying Aloe lotion, were virtually identical to actions that Amadee R. described.[16]

As the Rules Advisory Committee explained, the "availability of other means of proof" is an important factor in weighing the probative value of evidence. See Fed. R. Evid. 403 advisory committee's note:

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[16] Petitioner contends (Br. 39-40 & n.13) that the events Hartman described were too remote to be probative. In light of the reasons for admitting Hartman's testimony, however, the passage of time did not substantially undermine the probative value of the evidence. See 2 D. Louisell & C. Mueller, *Federal Evidence* § 140, at 195-198 (1985). The Hartman evidence simply indicated that the state of mind that accompanied petitioner's contacts with pre-adolescent boys and his motivation for associating with them remained the same over a period of years. Moreover, the passage of time actually strengthened the probative value of the evidence in one respect, since it refuted petitioner's suggestion that the government had fabricated the charges against petitioner by persuading impressionable young boys in the community to testify against petitioner.

see also Fed. R. Evid. 404(b) advisory committee's note. The testimony of Cory K. and Kyle Hartman was especially probative in light of the proof problems the government faced in this case. The charged offenses were committed outside the presence of other witnesses, against inarticulate young Indian children. As their halting and monosyllabic responses indicated, the child witnesses had difficulty in understanding and reluctance in answering the questions posed. See Tr. 385-427 (Fernando Y.), 428-492 (Jonathan T.), 537-606 (Amadee R.); see also 712-743 (Dr. Rosenzwieg). See generally *Maryland* v. *Craig*, 110 S. Ct. 3157, 3167-3170 (1990).[17]

Far from being "unnecessary" (Pet. Br. 29), the testimony of 19-year-old Cory K. and 27-year-old

[17] The trial judge made precisely that point, J.A. 70:

> I have to consider the nature of a trial such as this * * * and the methods of proof that are available to the Government in these kind of instances is severely lacking. And it is more severely lacking when you go to an Indian Reservation and have young people, who are unsophisticated * * * with respect to the acts that are being visited upon them, arguably, but also unsophisticated with respect to the people who investigate these activities, and the questions that are asked and the phrasing of the questions and all those matters, which inevitably lead to impeachment, credibility issues.
>
> And that has really been evident in this case as it was evident in the prior case that I tried recently * * *.
>
> There is a reluctance on the part of younger people to testify, a general unwillingness to do it, an unwillingness to come forward and be identified in these kind of activities. And as I say, the opportunities to confuse witnesses, to confuse issues, is simply overwhelming.

The problem with eliciting evidence from the child witnesses was exacerbated in the case of Amadee R., who admitted that he had some difficulty communicating in English, which was not his native language. Tr. 597.

Kyle Hartman was important to the jury's understanding of the facts. The trial judge, who heard their testimony outside the presence of the jury before ruling on its admissibility, properly concluded that the testimony should be allowed. Unlike the victims in this case, Cory K. and Kyle Hartman were old enough to understand the sexual aspects of petitioner's behavior and to describe it articulately. For the same reason, their testimony was highly probative in refuting petitioner's defense that the FBI had created witnesses by manipulating the children who testified to the charged acts of sexual abuse.[18]

2. Petitioner contends that the "other acts" evidence was not probative because he did not contest the intent elements of the charged crimes at trial, and "[a] bare plea of not guilty is insufficient to allow the admission of uncharged misconduct evidence on an uncontested issue." Pet. Br. 29. This Court squarely rejected that argument in *Estelle* v. *McGuire*, where the Court stated that

> the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts, "[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged." * * * The evidence * * * was relevant to show intent, and nothing in the Due Process Clause of the Fourteenth Amendment requires the State to

[18] Petitioner's argument (Pet. Br. 34) that the trial judge erred by prematurely admitting Cory K.'s testimony is without merit. From petitioner's opening statement and his cross-examination of the victim witnesses, the nature of his defense in this case was clear. Moreover, a trial judge exercises "the broadest sort of discretion in controlling the order of proof at trial." *Huddleston*, 485 U.S. at 690.

> refrain from introducing relevant evidence simply because the defense chooses not to contest the point.

112 S. Ct. at 481. See J.A. 178.

Petitioner alternatively contends that his offer "to concede or stipulate to the issue of intent should be a relevant factor to consider under Rule 403." Pet. Br. 42. No one disputes that general proposition.[19] As petitioner concedes (Pet. Br. 45-46), however, a defendant has no right to control the government's case by tactical stipulations that undermine the government's evidentiary presentation. The Seventh Circuit has made precisely that point, explaining that Rule 403 does not require the automatic acceptance of such stipulations in lieu of evidence:

> A fact may be proved as long as the probative value of the proof still exceeds the prejudicial effect, taking into account the offer to stipulate * * *. Indeed, [a] cold stipulation can deprive a party of the legitimate moral force of his evidence * * * and, can never fully substitute for tangible, physical evidence or the testimony of witnesses.

United States v. *Allen*, 798 F.2d 985, 1001 (1986) (citations, internal quotation marks, and emphasis omitted); accord *United States* v. *Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980). See also, *e.g.*, *United States* v. *Pedroza*, 750 F.2d 187, 201 (2d Cir. 1984), cert. denied, 479 U.S. 842 (1986). See J.A. 178.[20]

[19] The Rules Advisory Committee recognized that "situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent," noting that "the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403)." Fed. R. Evid. 401 advisory committee's note.

As the district court concluded, petitioner's offer to stipulate was an inadequate substitute for the witnesses' testimony. Petitioner was willing to stipulate only that if petitioner anally sodomized Amadee R. or fondled the genitals of Amadee R., Jonathan T., or Fernando Y. he did not do so because of "mistake or accident or other innocent reason." J.A. 169-170. See also J.A. 29-30, 33. His proposed stipulation—which simply amounted to a tautologous concession that if petitioner engaged in sexual acts, he did so for sexual pleasure—conceded nothing. A court may properly reject such a stipulation. See *United States* v. *Dynalectric Co.*, 859 F.2d 1559, 1581 (11th Cir. 1988).[21]

In addition, petitioner's proposed stipulation would have deprived the jury of evidence that was highly relevant in determining whether petitioner committed the charged offenses. Significantly, the charges included attempt offenses in which petitioner's intent

[20] Contrary to petitioner's assertions, Pet. Br. 44-45, the court of appeals in this case did not adopt a "rigid rule" concerning stipulations. Indeed, it did not address the issue at all. That is not surprising inasmuch as petitioner devoted only a few sentences in his lengthy court of appeals briefs to arguing the effect of the proposed stipulation. Pet. C.A. Br. 37-38; Pet. C.A. Reply Br. 13.

[21] Petitioner acknowledged at trial that "[w]e are never going to argue that sure [petitioner] inserted his penis in somebody's anus, but he did it innocently." J.A. 15. In this Court, he likewise acknowledges that "[i]t is simply impossible to argue with a straight face that [petitioner] could attempt to insert his penis into the anal opening of a young boy for some purpose other than sexual gratification." Pet. Br. 27.

was of paramount importance, because the sexual nature of the act depended on petitioner's state of mind. See 18 U.S.C. 2241. With respect to such potentially ambiguous conduct, a stipulation that if he engaged in a sexual act he did it for sexual gratification would provide the jury with no assistance at all in determining whether petitioner was attempting to perform a sexual act. As the judge noted, if "the offer to admit was that in other instances [petitioner] engaged in this conduct [sexual acts wth children], then that would be a different story." Tr. 878. But "to simply have a sterile stipulation that if [petitioner] did these things, that was his intention, certainly takes from the jury the opportunity to judge [his] intention and act upon it." *Ibid.*

The district judge's analysis of the stipulation was correct. Petitioner was not willing to stipulate to the substance of the witnesses' testimony—that petitioner had previously engaged in similar sexual acts with children of similar age in similar circumstances. As the district judge recognized, to accept the far more limited stipulation that petitioner offered in lieu of direct testimony from Cory K. and Kyle Hartman would have deprived the government of its right to present its case fully and effectively. See J.A. 35.

3. Petitioner argues that the probative value of the extrinsic act testimony was substantially outweighed by the danger that the evidence would result in unfair prejudice. Pet. Br. 35-39. See J.A. 16-18, 20-21. The government's use of extrinsic act evidence, however, does not result in "unfair prejudice" simply because it increases the likelihood of conviction. The fundamental purpose of a criminal trial is to determine facts reliably—not to give the defendant a "chance of winning." J.A. 20. A defendant may

find that extrinsic act evidence is "devastating," J.A. 18, 20, precisely because it is highly probative in determining the facts. To exclude evidence as unfairly prejudicial under Rule 403, the defense must show that the admission of the evidence may "suggest a decision on an improper basis." Fed. R. Evid. 403 advisory committee's note. Even then, the evidence is admissible unless that danger "substantially" outweighs the probative value of the evidence. Fed. R. Evid. 403.

The testimony of Cory K. and Kyle Hartman raised the possibility of unfair prejudice in the sense that the jury might have used the testimony to conclude that petitioner had a "bad" character and might have convicted him on that basis. That possibility is always present when extrinsic acts have moral connotations, but there is no reason to presume that a jury will typically misuse evidence in that manner. Rule 404 (b) prohibits the prosecutor from using extrinsic act evidence to imply bad character, and a rational jury can be expected to reject that implication on its own, reasoning that character-based inferences are not reliable. See Fed. R. Evid. 404 advisory committee's notes. Although particular juries might depart from the ideal of the rational jury, there is no reason to assume that a jury will naturally draw character inferences if the prosecutor has not suggested such inferences in presenting his case.[22]

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[22] Petitioner suggests that the prosecutor acted improperly in using Kyle Hartman's testimony in closing argument to refute petitioner's statement that he did not have intercourse with children. Pet. Br. 17, 41 n.14. See Tr. 1729. As we have explained, however, Hartman's testimony was properly admitted for that purpose. See pp. 22-24, *supra*. Petitioner also suggests that the prosecutor improperly "hinted" in his rebut-

The danger of unfair prejudice is most likely to arise if the evidence appeals to the jury's emotions. See Fed. R. Evid. 403 advisory committee's note. Although extrinsic act evidence that a person sexually abused children obviously can have an emotional impact on the jury, the marginal impact of that evidence was limited in this case, because petitioner was already being tried on charges that he sexually abused children. The jury heard the opening statements of counsel, the testimony of the three child victims, and the testimony of other witnesses—all relating to sexual abuse of children—before any extrinsic act evidence was admitted. Thus, the testimony of Cory K. and Kyle Hartman did not introduce an inflammatory subject for the first time in the trial.[23]

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tal argument that the testimony of Cory K. and Kyle Hartman "could be used to show [petitioner's] propensity." Pet. Br. 17, 39 n.13, 41 n.14. The prosecutor stated as follows:

> [Petitioner's counsel] did say to look to corroboration, and I think I concur with him on that, but look to the corroboration on both sides. Look to the corroboration in this particular instance of this unusual attraction to boys, of this grabbing of the private parts, or engaging in anal intercourse, allowing a minor to drive a car, the seduction that takes place at his trailer.

Tr. 1798. The prosecutor's use of extrinsic act evidence to corroborate the distinctive aspects of petitioner's behavior, his specific motivations, and his reasons for associating with children—what petitioner describes as "propensity"—was entirely proper. See pp. 22-24, 28-29, *supra*. The trial court correctly rejected petitioner's objection to those statements. Tr. 1803-1804.

[23] Although petitioner complains about "the introduction of massive amounts of extremely prejudicial prior bad acts" (Pet. Br. 18), the testimony of Cory K. and Kyle Hartman occupied a relatively small portion of the trial proceedings. Cory K.'s entire testimony before the jury is contained in 63

The danger of unfair prejudice in this case was further reduced by the trial court's use of traditional mechanisms for preventing prejudice, including directions to counsel restricting the scope of the evidence admitted and instructions to the jury specifying how the evidence could be used. See *Huddleston*, 485 U.S. at 691; *Spencer* v. *Texas*, 385 U.S. 554, 561-562 (1967). The trial judge took special precautions "to screen or sanitize" the testimony "as much as possible" so that "the gross nature of the other acts simply wouldn't be so prejudicial as to inflame the jury." J.A. 28; see also J.A. 30, 83-84. As a result, the testimony was not unduly graphic. See J.A. 78-81, 127-135. In addition, the trial court gave the jury limiting instructions on the use of extrinsic evidence at the time Cory K. and Kyle Hartman testified, J.A. 75, 127, and at the close of trial, Tr. 1715-1716.

Petitioner contends that the court's limiting instructions "did not eliminate the prejudice." Pet. Br. 40-41. As this Court has repeatedly held, however, a jury is presumed to follow such instructions. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-208 (1987) (collecting cases). There is no reason to doubt that the jury did so here. The danger of prejudice was

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of the 1823 pages of trial transcript. See Tr. 893-956. He described sexual acts, on direct and redirect examination, in less than seven of those pages. Tr. 897, 902-903, 909-910, 951-952 (J.A. 75, 79-80, 84-85). Kyle Hartman's entire testimony before the jury is contained in ten pages. Tr. 1663-1672 (J.A. 125-132). The prosecutor made only brief mention of Cory K.'s and Kyle Hartman's testimony in closing argument. See Tr. 1725, 1728-1729, 1798-1799. Notably, petitioner would have been tried in the same proceeding on charges that he sexually abused Cory K., except that the relevant counts of the indictment had been severed to allow petitioner to present a "consent" defense to the charges pertaining to Cory K. See pp. 2-3, 5-6, *supra*.

further minimized in this case because the pattern limiting instruction given by the judge, see Tr. 886-888, was, if anything, overly restrictive in setting out the use the jury could make of the challenged evidence. The judge first instructed the jury that it could consider the evidence "only to the extent that they show motive, intent, preparation or planning." J.A. 75, 127; Tr. 1715. The judge then stated that

> evidence that [petitioner] may have committed a similar act at an earlier time may not be considered by the jury in determining if [petitioner] is guilty of any of the offenses involved in this case.

J.A. 75, 127; Tr. 1715. The judge additionally stated that the evidence could not be used

> to establish motive, intent, preparation or planning, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that [petitioner] did the particular acts charged in the indictment before you.

J.A. 75, 127; Tr. 1715-1716. As we have explained, it would have been proper for the court to permit the jury to use the testimony of Cory K. and Kyle Hartman to determine whether petitioner committed the charged acts in the first place; it was not necessary for the court to prohibit the jury from making use of the extrinsic act evidence unless it found from the other evidence in the case that petitioner had committed the charged acts. Petitioner therefore was the beneficiary of an overly favorable limiting instruction.[24]

---

[24] Petitioner recites other "additional factors" that he contends added to the prejudicial effect of the evidence. Pet. Br. 39 n.13. As we have explained, Hartman's testimony was not too remote (see p. 31 n.16, *supra*), the government did not use the extrinsic act evidence improperly in closing argument (see p. 37 n.22, *supra*), and petitioner was not "improperly baited" on cross-examination (see p. 23 n.10, *supra*). The district judge also did not err in refusing to grant petitioner a one-month continuance to investigate Hartman's allegations. J.A. 68. The government announced on a Thursday that it had located Hartman and intended to call him as a witness. J.A. 48. Hartman did not testify until the following Tuesday. The judge inquired into the matter and determined that petitioner had an adequate amount of time under the circumstances to interview Hartman and to investigate his allegations. See J.A. 67-68; Tr. 1674-1676. The judge's refusal to grant a continuance was not an abuse of discretion. See *Morris* v. *Slappy*, 461 U.S. 1 (1983).

In sum, the trial judge did not abuse his discretion under Rule 403 in refusing to exclude the extrinsic act testimony in this case. The testimony was highly probative, and even taking into account petitioner's offer to stipulate, the risk of unfair prejudice was slight.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1992

APPENDIX

STATUTES AND RULES INVOLVED

The Sexual Abuse Act of 1986, 18 U.S.C. 2241 *et seq.*, provides in pertinent part:

§ 2241. Aggravated sexual abuse

(a) By force or threat.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

* * * * *

(c) With children.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

* * * * *

§ 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear * * *;

* * * * *

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

* * * * *

§ 2244. **Abusive sexual contact**

(a) Sexual contact in circumstances where sexual acts are punished by this chapter.—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if to do so would violate—

(1) section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years; or both;

* * * * *

§ 2245. **Definitions for chapter**

As used in this chapter—

* * * * *

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

* * * * *

The Federal Rules of Evidence provide in pertinent part:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considera-

tions of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule. 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes

* * * * *

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

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No. 91-6646

In The

Supreme Court of the United States

October Term, 1992

VERL HADLEY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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Graham, *Handbook of Federal Evidence*, Section 404.1 (3rd Edition, 1991) 14

Guldenschuh, *Federal Rules of Evidence – Rule 404(b) Limits the Admission of other Crimes Evidence, Under an Inclusionary Approach, to Cases Where it is Relevant to an Issue in Dispute*, 55 Notre Dame Lawyer 574 (1980) 13

Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604 (1989) 15

Imwinkelried and Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 Pacific L.J. 1005 (1992) 18

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ARGUMENT

A. JUDICIAL ADMISSIONS SHOULD BE WEIGHED AS AN IMPORTANT FACTOR UNDER RULE 403 IN APPROPRIATE CASES

A split between the federal circuit courts exists on the question of whether or not the trial court must consider a judicial admission or proposed stipulation on a technical issue of "specific intent" as an alternative to admitting extremely prejudicial prior bad acts, as part of the balancing process required by Rule 403, Federal Rules of Evidence. Mr. Hadley contends that the statutory element of "intent" (touching for sexual gratification) was not contested at trial and could easily be inferred from the nature of the acts charged (placing lotion on the penis of another or attempted sodomy). Therefore, his proposed stipulation rationally eliminated the issue of "intent" without detracting from the government's ability to fairly prove its case with legitimate evidence.

The government argues that it was justified in presenting evidence of more than a dozen hotly contested prior acts of sodomy between Mr. Hadley and other male adolescents that occurred up to seventeen years earlier in order to prove that his "intent" in touching children was for the purpose of sexual gratification. We submit that the government's position is disingenuous. Since "intent" was not a disputed issue at trial and was easily shown from the nature of the alleged acts alone, the government's real goal was to prove that Mr. Hadley was guilty of the physical acts or touchings at issue by showing that he was acting in conformity with his supposed past misdeeds.

In light of the extreme prejudice flowing from the prior uncharged misconduct evidence, "[t]he availability of other means of proof" was an important factor to consider under Rule 403. See Notes of Advisory Committee to Rule 403. The Court of Appeals for the Ninth Circuit flatly rejected the proposed stipulation since a "specific intent" crime had been charged. But the government has now conceded the issue. It agrees that a judicial admission should be considered as an

important factor under Rule 403. (Br. of U.S. at p. 34 and n. 19).

Yet, the government insists that the judgment of the trial court and the decision of the Ninth Circuit should be upheld even though both courts below refused to give any real weight to the proposed stipulation. The government asks this Court to sustain the admission of the prior bad acts on appeal without requiring the courts below to fully consider the proposed stipulation as part of the balancing process under Rule 403 in the first instance.

Indeed, the government urges this Court not only to sit as a trial court but to engage in the balancing process required under Rule 403 by considering arguments and factors not advanced below.[1] The government has tacitly conceded that it cannot successfully support the decision of both courts below, which allow massive evidence of prior bad acts without fairly considering Mr. Hadley's proposed stipulation or judicial admission.[2]

To be sure, we realize that the government has made a rather slick move. Rather than directly address the troubling "questions presented" by the petitioner, the government has attempted to shift the focus of this court's review by submitting, for instance, that Mr. Hadley's "principal contention" is that the trial court erred by not excluding the prior bad acts under Rule 403. The main thrust of Mr. Hadley's petition, however, is that the proposed stipulation or judicial admission was appropriate in this case. It would have allowed the trial court to protect Mr. Hadley from substantial, unfair prejudice while promoting the government's ability and duty to prove

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[1] Since the government did not file a cross-petition, it may defend its judgment only on grounds properly raised below. Stern, Gressman & Shapiro, *Supreme Court Practice*, Sec. 63.5 (Sixth Ed. 1986).

[2] At trial, the government responded to the proposed stipulation or admission by stating: "I would not be prepared to do that." In turn, the trial court ruled: "Well, you can discuss that with Mr. Husk. I would not require him to do that." (R.T., Vol. 4, p. 687, J.A. 30). The Court of Appeals held that judicial admissions need not be considered when a "specific intent" crime has been charged. 918 F. 2d 848, 851-52 (9th Cir. 1990) (J.A. 177-78).

the specific acts charged in the indictment. It would have preserved a fair trial.

The judicial admission would have tipped the balancing scales of Rule 403 in favor of excluding the prior bad acts. The need or probative value of the prior bad acts would have been lessened, while the extreme prejudice would have become unnecessary and intolerable.[3] The important issue concerning judicial admissions, spotlighted by a split in the circuit courts, should be squarely addressed by this Court – even if the government was not up to the task.

B. THE ROLE OF THE PRIOR BAD ACTS ACCORDING TO THE GOVERNMENT – A REVISIONIST'S ATTEMPT TO RESHAPE THE FACTORS UNDER RULE 403.

Rather than point to "evidence" and testimony showing that the slight issue of "intent" was disputed at trial to justify the admission of prior bad acts, the government relies upon the opening statement of defense counsel, as well as, a pre-trial motion submitted by defense counsel raising the plausibility of a consent defense to several counts involving Cory K. The government argues that the prior bad acts were necessary to overcome these items of non-evidence (Br. of U.S. at pp. 3, 10, 22 and 38). Counsel for Mr. Hadley withdrew any proposal of a "consent defense" to the counts involving Cory K. during the telephonic conference that occurred on April 27, 1989. (R.T. April 27, 1989, at pp. 8-12).[4]

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[3] The careful use of judicial admissions in appropriate cases would also discourage "intellectual dishonesty" by trial court litigants. The persistent practice of arguing for the admission of prior bad acts to promote one of the "other purposes" under Rule 404(b) as mere legal lip service, while actually hoping to influence the jury with damaging bad character evidence, should be discouraged. The ends do not justify the means in our business. The intelligent use of judicial admissions or stipulations would not only promote fair trials, but also the credibility of lawyers and judges alike.

[4] As related during trial, a "consent issue" existed regarding Cory K. because Mr. K. had indicated to both Morris Singer and Arnold Dobi that he had carried on a consensual relationship with Mr. Hadley. (R.T., Vol. 3, pp. 666-67, J.A. 19-20). As indicated by defense counsel, the issue of "consent" could be raised without any

The government also argues that the indictment was severed immediately prior to trial in order to accommodate the request of defense counsel. (Br. of U.S. at p. 3). But, the government does not present the issue or facts in perspective. Indeed, counsel for Mr. Hadley requested that all of the counts involving Cory K. should be tried separately from all other counts in the indictment. The trial court, however, refused to sever the counts as requested by defense counsel. (See R.T., April 27, 1989, at pp. 10-12). Moreover, the severance did not benefit Mr. Hadley during trial. Judge Carroll ruled that all of the other counts of the indictment could be admitted as prior bad acts during the first trial.

The government not only argues that prior bad act evidence was admissible to rebut defense counsel's opening statement, but it also insinuates that defense counsel's opening statement was not supported by any evidence introduced at trial. (See, e.g., Br. of U.S. at pp. 10 and 38). We beg to differ.

Defense counsel for Mr. Hadley made a relatively brief opening statement. The opening statement consumed eight pages of the trial court transcript. (R.T., Vol. 2, at pp. 344-352). Counsel correctly informed the jury that the F.B.I. was under pressure to identify and solve the problem of sexual abuse by teachers on the Navajo Indian Reservation. (R.T., Vol. 2, at p. 346). Counsel told the jury that the F.B.I. agents used "aggressive interview tactics". (R.T., Vol. 2, at p. 349). Counsel asked the jury to consider whether or not the children had been coached or pressured into making statements against Verl Hadley. (R.T., Vol. 2, at p. 350).

Defense counsel's overview of the case was supported by almost every witness that testified, including the alleged victims. For instance, Jonathan T. admitted that he "made up" a story against Verl Hadley for the F.B.I. He testified that he

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testimony from Verl Hadley. It is the inconsistent statements of Cory K., not Verl Hadley, that would have allowed counsel to present a "consent" defense at a separate trial against the charges of sodomy by force. Once again, Mr. Hadley never indicated that he had engaged in consensual, sexual activity with Cory K. The government is seemingly grasping at straws.

was afraid of the F.B.I. (Def. Ex. "I", J.A. 159-60). Amadee R., like virtually every other minor, was interviewed by F.B.I. agents without parental permission or the presence of any adult other than law enforcement officials. The F.B.I. told Amadee R. that he could not leave the room during the interview. Amadee R. testified that he was afraid of the F.B.I. agents. He admitted that he felt that he had to tell the F.B.I. agents something about Verl Hadley before he could leave the room. (R.T., Vol. 3, at pp. 574-575, 605-06).[5]

In his opening statement, defense counsel told the jury that the F.B.I. had interviewed all of the sixth, seventh, and eighth grade students at the Chilchinbeto School. (R.T., Vol.

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[5] One of the witnesses listed by the government to support evidence of prior bad acts, Junior H., testified for the defense. He testified that he repeatedly told the F.B.I. that Verl Hadley had not touched him. Nevertheless, F.B.I. Agent Schafer accused Junior H. of lying. The F.B.I. agents told Junior H. that they would not allow him to leave until he told the truth. If he had to go to the bathroom they would go with him. (R.T., Vol. 5, at p. 1002). F.B.I. agents told Junior H. that he had been seen in a car doing something "bad" with Verl Hadley. (R.T., Vol. 5, at p. 1004). Junior H. testified that he was eventually forced by the F.B.I. to make up stories about Verl Hadley. (R.T., Vol. 5, at pp. 1004-06).

Later, Junior H. told other members of his family that he had been forced to lie about Verl Hadley. He missed eleven days of school because he was upset about the incident. He subsequently contacted the F.B.I. and told them that his stories about Verl Hadley were not true. (R.T. Vol. 5, at pp. 1005-10).

Similarly, Travis Y. was also slated to testify about prior bad acts involving Verl Hadley. But, he also accused the F.B.I. agents of pressuring him to make incriminating statements about Mr. Hadley that were untrue. (R.T., Vol. 4, at pp. 816-44). His statements were consistent with many other witnesses who testified that the F.B.I. pressured them into making incriminating statements against Mr. Hadley.

Another student at the Chilchinbeto School, Dwayne C., age fifteen, testified that the F.B.I. accused him of not telling the truth when he told them that Verl Hadley had not touched him. (R.T. Vol. 5, at p. 1038). Marlow S., age fifteen, also testified that he was repeatedly interviewed by F.B.I. agents. Although he informed the F.B.I. that Verl Hadley had never touched him inappropriately, the F.B.I. insisted that he was not telling the truth. (R.T., Vol. 6, at pp. 1077-78). Wanda Chief, age eighteen, testified that she was offensively grabbed by an unknown F.B.I. agent during the investigation of Verl Hadley. Ms. Chief testified that she was threatened by the agent. (R.T., Vol. 6, at pp. 1199-1201). Also see the testimony of Duane B. (R.T., Vol. 5, pp. 1036-38).

2, at pp. 348-49). Agent Schafer confirmed that he had interviewed in excess of 75 students, including all sixth, seventh, and eighth graders at the Chilchinbeto School. Agent Schafer did not begin his investigation at the school because Verl Hadley was considered a suspect, but interviewed students while "conducting a parallel investigation in regards to another child molester". (R.T., Vol. 8, at p. 1473). At one point, Agent Schafer was informed by Agent McIlwaine that Junior H. had complained that Agent Schafer accused him of being a liar. (R.T., Vol. 8, at p. 1488).

Agent Schafer admitted that he often told students that he was conducting an investigation against Verl Hadley and that several other children had admitted that Verl Hadley had improperly touched them. (R.T., Vol. 8, at p. 1488). At times, he told the students that he didn't believe them when they told him that Verl Hadley had not touched them improperly. (R.T., Vol. 2, at p. 1489). Indeed, Agent Schafer admitted that he told several of the students that they could be prosecuted for perjury. (R.T., Vol. 2, at 1490). No wonder so many of the students felt that he had intimidated them.

While the government was allowed to rebut evidence of F.B.I. intimidation with testimony of proper interviewing techniques, neither the opening statement of defense counsel nor the testimony of the students opened the door to prior bad act evidence. Instead, the testimony framed the appropriate issue in this case. Did Amadee R. accurately accuse Verl Hadley of improperly touching him or did he, as contended by Jonathan T., make up stories about Verl Hadley as well. To be sure, even Amadee R. admitted that he was afraid of the F.B.I. and conceded that he felt pressured to make accusations against Hadley in order to get the F.B.I. to leave him alone.[6]

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[6] Yet, the government attempts to justify the testimony of Kyle Hartman on the basis of defense counsel's "opening statement". (Br. of U.S. at p. 10). While Mr. Hadley was on trial for "touching" the students named within the indictment, Kyle Hartman testified not only that Verl Hadley had sodomized him, but that he had sodomized Verl Hadley as well. (R.T., Vol. 9, at p. 1670, J.A. 130-31).

C. GOOD CHARACTER NEVER PRESENTED.

At several points in the brief for the United States, the government indicates that the prior bad acts admitted against Mr. Hadley were admitted in order to rebut a "good character" defense proffered by Mr. Hadley and his attorney. (See Br. of U.S. at n. 2-3).[7] The defense cross-examined the government's witnesses by showing them that Verl Hadley obtained a pair of sweatpants to replace a pair of torn pants that Jonathan T. was wearing at school. (R.T., Vol. 2, pp. 428-37). (See Br. of Pet. at p. 4). Defense counsel's questions relating to the incident involving the sweatpants clearly did not constitute an attempt to present evidence of "good character". The fact that Mr. Hadley was assigned to "Children Incorporated" at his school simply explained why he was the custodian of spare clothes purchased by the organization. He obtained an extra pair of pants for Jonathan T. because he was the custodian of spare clothes at the school. (R.T., Vol. 7, pp. 1270-71). Since the touching incident with Jonathan T. supposedly occurred when he changed from his torn pants to the sweatpants provided by Mr. Hadley, it was necessary to explain why Mr. Hadley was the person that retrieved the sweatpants. No "good character" defense was presented.[8]

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[7] To be sure, the brief portions of the transcripts quoted by the government do not fairly reflect the exchange between the trial court and defense counsel. (See R.T., Vol. 8, pp. 659-676, J.A. 14-25).

[8] Indeed, the government's quote from the record, at fn. 2, curiously omits the last sentence or question uttered by Judge Carroll. Instead of making a finding or statement regarding the defense raised by Mr. Hadley, Judge Carroll asked "that is your intent and motive?" Defense counsel answered the query by stating that he had no intent or motive to raise a good character defense. A review of the entire trial court record will show that defense counsel did not ever open the door to prior bad act evidence by challenging the issue of intent or motive. No good character defense was ever presented. The government's apparent contention to the contrary is mistaken as a matter of fact and misleading as a matter of law.

The same conclusions will be reached if fn. 3. of the Brief of the United States is carefully examined and placed in perspective. Defense counsel simply cross-examined Amadee R. relating to the specific incidents in question. If defense counsel raised the issue of "intent" by questioning any of the witnesses, the government has certainly failed to point to the relevant portions of the record

D. PROPOSED STIPULATION ELIMINATED ISSUE OF "INTENT".

The Brief of the United States attempts to belittle defense counsel's proposed stipulation or judicial admission relating to "intent" by referring only to a small portion of the proposed stipulation. (See, Br. of U.S. at n.4). Mr. Hadley's attorney repeatedly offered a comprehensive stipulation that would have unequivocally eliminated the issue of "intent" or "motive" from the trial. (Also see R.T., Vol. 4, p. 687, J.A. 29-30; R.T. Vol. 4, pp. 856-57; Vol. 5, pp. 879-884, J.A. 33-36; Supplemental Memorandum in Opposition to Government's Motion in Limine, J.A. 167-71).

The government relies upon Judge Carroll's refusal to accept the proffered stipulation from Mr. Hadley's attorney. The government complains that defense counsel only offered to stipulate to the issue of mens rea, not actus rea. (See Br. of U.S. at p. 8). The proposed stipulation eliminated the need for prior misconduct evidence to establish the slight issue of "intent" required by federal statute. The government essentially argues that the accused citizen may plead guilty to the entire indictment; but that no lesser admission would ever be relevant to consider as part of the balancing process under Rule 403. But, the Advisory Committee notes that Rule 403 specifically directs the trial judge to consider "alternative means of proof", as well as, "the exclusion of evidence offered to prove a point conceded by the opponent."

Although the government contends that Mr. Hadley's stipulation was inadequate, it persistently fails to state why and how the stipulation was supposedly inadequate to establish the mens rea in question. Mr. Hadley did not argue that "if he sexually abused the children, he did so for sexual pleasure". (Br. of U.S. at p. 16). Instead, Mr. Hadley stipulated that the requisite intent required by federal statute would be met if the jury found that he touched any of the

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supporting its supposed theory. If this Court examines defense counsel's cross-examination of Amadee R., it will find that no such issue was raised. (See R.T., Vol. 3, 560-597).

minor children in any private area. Once again, the government's attempt to change the posture of Mr. Hadley's proposed stipulation seems to indicate its inability to overcome the full force and logic of the stipulation.

E. TESTIMONY OF VERL HADLEY.

The government makes much of the fact that defense counsel asked Mr. Hadley whether or not he had sexual relations with other minors during 1984-85. (See Br. of U.S. at p. 11). But, the government has creatively quoted only part of counsel's question and refused to place it in context.

When Mr. Hadley was interrogated by Agent Schafer, Mr. Hadley was told that he could either get probation and counseling or prison for a very, very long time without any possibility of parole. (R.T., Vol. 8, at p. 1522). But, Agent Schafer told Hadley that "in order for him to get counseling, there has to be a problem. If there was a problem, then he will most certainly have to cooperate and tell people what the problem is in order for them to give him the proper type of counseling." (R.T., Vol. 8, at p. 1525). Agent Schafer further advised Mr. Hadley that, if he did not cooperate by making a statement, then Agent Schafer would be forced to play "hard ball" with him. (R.T., Vol. 8, at p. 1514). After Mr. Hadley asked for a lawyer, Agent Schafer told him "there is a distinct possibility that you will be arrested and if your lawyer won't let me talk to you, the next time I will see you is when I arrest you." (R.T., Vol. 8, at p. 1518).

As a result, Verl Hadley agreed to talk to Agent Schafer during his second interview. He told Agent Schafer that he had a drinking problem from 1984-85 while his father became ill and later died. (R.T., Vol. 8, at pp. 1529-30). He told Schafer that the drinking problem affected his mental health. He provided Schafer with a written statement. (R.T., Vol. 7, pp. 1320-23).

Agent Schafer testified that Mr. Hadley told him that it is "possible" that he had sexual relations with boys during the period of time that he was drinking heavily since he was not fully aware of what he was doing. (R.T., Vol. 8, p. 1461). Mr.

Hadley denied making such statements to Agent Schafer. They were not in his written statement. The third party present during the interview, Mr. John Yazzie, confirmed that Mr. Hadley denied having sexual relations with Cory K. or others. (R.T., Vol. 8, pp. 1542-53).

As a result of Agent Schafer's testimony, defense counsel simply asked Mr. Hadley whether or not he had "sexual relationships with other minors" during "the period of time that you were consuming alcohol" for the period of 1984-85. (R.T., Vol. 7, at p. 1326). Although the trial court and the government later accused defense counsel of asking "carefully phrased questions on direct, with respect to time frames and other matters", the record simply shows that defense counsel attempted to rebut the testimony of Agent Schafer that Mr. Hadley was drinking so heavily during 1984-85 that he could have molested students because he was too drunk to know what he was doing. To be sure, the rather straightforward questioning of defense counsel did not logically open the door to other prior misconduct evidence and was not carefully crafted to raise the inference that Verl Hadley never associated with any minor students.

The government repeatedly justifies the admission of prior misconduct evidence upon the supposed defense raised by Mr. Hadley that he "had a strictly benevolent relationship with the child victims and had never had intercourse with any minor males." (Br. of U.S. at pp. 12, 19, 22, 23, and 28). But, the "benevolent relationship" issue has been created by the government. It was never used by Mr. Hadley. The terminology or its equivalent does not appear in the record documenting the testimony of Mr. Hadley or his witnesses.

In this same vein, Mr. Hadley explained that he took students on swimming trips. But, Mr. Hadley explained his actions in accompanying students on swimming trips simply because Amadee R. accused him of misconduct during such a trip. Mr. Hadley's testimony centered upon the specific facts of the case; but did not constitute an affirmative defense. According to the government, the defense opened the door to prior misconduct evidence by simply asking Mr. Hadley to deny the charges against him. The government relies upon Mr. Hadley's testimony relating to Amadee R. to

argue that a good character defense was presented. (See R.T., Vol. 7, at pp. 1281-92; Br. of U.S. at p. 23).

The introduction of Kyle Hartman's testimony did not rebut Mr. Hadley's testimony. Instead, it injected new, undisclosed issues into the case. It is simply silly to pretend that Mr. Hadley's testimony, which denied the substance of the indictment against him, opened the door to testimony from Kyle Hartman relating to supposed misconduct that occurred seventeen years earlier.

Mr. Hadley never presented any evidence whatsoever that he somehow innocently or accidentally placed lotion on Amadee R. or anyone else. The government has ascribed a defense to Mr. Hadley that was never used. (See Br. of U.S. at pp. 15, 21).

Of course, the testimony of Cory K. and Kyle Hartman do not tend to rebut Mr. Hadley's defense that F.B.I. agents had manipulated the minor victims to testify against Mr. Hadley. Instead, the prior uncharged misconduct evidence merely constitutes circumstantial evidence of character. The government's use of the prior misconduct evidence is, at best, an attempt to show that Mr. Hadley has a propensity to commit acts of sexual misconduct against adolescent males. The obvious thrust of the government's case was to show that since Mr. Hadley has arguably done such acts in the past, he probably did them in this case as well. Therefore, his assertion that the F.B.I. agents had manipulated the minor victims in this case should be rejected – not on the basis of specific evidence in this case – but on the basis that Mr. Hadley has shown a propensity to commit crimes like those charged in this case. (See Br. of the U.S. at p. 15).

The government contends that the evidence of prior uncharged misconduct evidence was not used to show that Mr. Hadley acted in conformity with uncharged misdeeds. Somehow, the government argues that its use of the evidence to show that Mr. Hadley "engaged in a distinctive pattern of behavior" over a period of time does not constitute propensity evidence.

F. CHARACTER EVIDENCE UNDER THE FEDERAL RULES OF EVIDENCE.

It is surprising to find that the government has failed to grasp the meaning of character evidence under the Federal

Rules of Evidence. Perhaps, the government's failure to grasp the meaning of character evidence stems from its limited review of applicable law. The government's rather unique construction of the character rules withers in light of clearly accepted principles established by the vast majority of federal cases construing them.

The government attempts to narrowly constrict the meaning of "character". (Br. of U.S. at pp. 24-25). Then, the government argues that prior bad acts are always admissible, apparently without limitation by any rule of evidence except the general relevancy standard of Rule 401, unless they are offered to prove "a person's moral qualities in order to draw inferences about how he behaved on a particular occasion." *Ibid.* at 25.

The government's argument, which is one of its pivotal points before this Court, is misplaced for numerous reasons. Rule 404(b) explicitly states that evidence of other crimes, wrongs or acts is not admissible "to show action in conformity therewith." In other words, one cannot prove that the accused citizen is guilty of sexual misconduct on one occasion by showing that he or she was guilty of a similar act on a previous occasion. Yet, the government repeatedly argues that the prior bad acts of Verl Hadley were properly admitted at trial because they show that he "has engaged in a pattern of distinctive behavior that includes the conduct with which he is charged." (Br. of U.S. at pp. 26, 16, and 20).

The government complains that Rule 404(b) only limits the use of extrinsic act evidence to prove "character" – not "propensity". (Br. of U.S. at n. 14). The myopic distinction is misplaced and somewhat irrelevant.

First of all, the definition of "character" taken by the government from one or two dictionaries simply does not comport with the broad use of character evidence under the federal rules.[9]

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[9] Indeed, the definition of "character" is much broader – even by dictionary standards. By common understanding, "character" refers to "one of the attributes or features that make up and distinguish the individual . . . the complex of mental and ethical traits making a person". See Merriam Webster's Seventh New Collegiate Dictionary (1970). In other words, the inclination of a person to act in conformity with his or her character essentially makes up not only the substance of Rule 404(b), but also parallels the definition of the term "propensity".

> The prohibition in the first sentence of [Rule 404(b)] has two components. First, the sentence refers to the use of the uncharged acts "to prove the character of a person." The language, "the character of a person," refers to proof that the defendant is inclined to wrongdoing in general or that the defendant tends to commit a particular type of wrongdoing; thus, the prosecutor may not prove that the defendant is either generally a criminal or more particularly a rapist or a burglar.
>
> * * *
>
> Evidence of a criminal defendant's uncharged misconduct creates the risk that the jury will penalize the defendant for his bad character.

Imwinkelried, *Uncharged Misconduct Evidence*, Sections 2:18, 1:13, and 1:03 (1984 and 1992 Supp.). In other words, Rule 404(b) refers to the use of circumstantial evidence of past misdeeds to show that the accused citizen acted in conformity therewith for the charges on trial. Yet, Rule 404(b) prohibits the use of prior uncharged misconduct to establish a criminal predisposition, propensity or inclination of the accused citizen to commit the specific act for which he or she is on trial. That is why courts and commentators almost universally use the term "propensity". Rule 404(b) directly addresses one's criminal predisposition or propensity to commit specific misdeeds. See, e.g., *Comments, Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. Rev. 261, 263 (1977) ("This basic tenet of evidence law is recognized by every major commentator", citing Wigmore and others. At n. 16); Guldenschuh, *Federal Rules of Evidence – Rule 404(b) Limits the Admission of other Crimes Evidence, Under an Inclusionary Approach, to Cases Where it is Relevant to an Issue in Dispute*, 55 Notre Dame Lawyer 574, 577 (1980); J. Weinstein and M. Berger,

Weinstein's Evidence, Section 404[09] (1985). The attempt to show a trait of character by evidence of prior misdeeds is "sometimes described as 'circumstantial' use of character." Graham, *Handbook of Federal Evidence*, Section 404.1 (3rd Edition, 1991).

Moreover, the government's attempt to redefine "character" for purposes of Rule 404(b) is actually taken, although somewhat out of context, from Professor Kuhns' article entitled, "*The Propensity to Misunderstand the Character of Specific Act Evidence*", 66 Iowa L. Rev. 777, 779 (1981) [hereinafter referred to as "Specific Act Evidence"]. But, Professor Kuhns plainly states that the term "character" is "commonly understood" to have two attributes. *Specific Act Evidence* at 779. Although the government uses the first attribute cited by Professor Kuhns, it omitted the second attribute. (See Br. of U.S. at n. 13).

> The second attribute of character is suggested by the fact that the prohibition against specific acts evidence to prove character is limited to showing action in conformity with character . . . Or, to put it somewhat differently, proof of a person's character trait is proof that a person has a propensity to behave in a particular manner. Indeed, the terms "character" and "propensity" are often used interchangeably, and the prohibition against specific act evidence is frequently described as a prohibition against the use of specific acts for propensity purposes.

Specific Act Evidence at pp. 779-780. The purpose of Professor Kuhns' article was to show "that neither the concept of propensity nor the concept of character is helpful to an understanding of how courts have ruled or should rule on the admissibility of specific acts evidence." *Specific Act Evidence* at p. 781. In the end, Professor Kuhns suggests that Rule 404 should be amended. He suggests the desirability of articulating a balancing test that is less favorable to admissibility than the test set forth in Rule 403. *Specific Act Evidence* at p. 810.

As this Court has noted, "[e]xtrinsic acts evidence may be critical to the establishment of the truth as to a **disputed issue**, especially when that issue involves the actor's state of mind and the **only means of ascertaining that mental state** is by drawing inferences from the conduct." *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (emphasis added). AS recognized by the Advisory Committee on Rule 401, which defines "relevant evidence", "situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent . . . ". "[U]ndue prejudice" should be considered in determining whether or not a concession or stipulation should be accepted.

The "mental state" of Mr. Hadley was never a disputed issue at trial. Moreover, the requisite "intent" is necessarily inferred from the act of touching someone on their sexual organs. No lingering question of "intent" remained.

The government did not dispute that intent could be inferred from the nature of the act alone. *See, United States v. Gruttadauro*, 818 F.2d 1323, 1327-28 (7th Cir. 1987).

> The court acknowledged that prior bad acts evidence is ordinarily used to show intent when the defendant has admitted the action but denied any culpable mental state. By framing the defense in this way, the defendant specifically raises the issue of intent. In the absence of such a defense, however, intent may not be an issue, thus obviating the need for the prior bad acts evidence.

Hutton, *Commentary: Prior Bad Acts Evidence in Cases of Sexual Contact with a Child*, 34 S.D. L. Rev. 604, 608 (1989). But, the government now insists that it should be allowed to introduce evidence of prior bad acts to prove the physical actions in controversy, rather than the culpable mental state. At trial, however, the government argued that the evidence was admissible to establish "intent". The new argument simply represents a classic example of an attempt to justify the admission of prior bad acts in order to show that the accused citizen acted in conformity therewith.

In *Huddleston*, this Court expressed its "concern that unduly prejudicial evidence might be introduced under Rule

404(b)". This Court stated "that the protection against such unfair prejudice emanates from the requirement of Rule 404(b) that the evidence be offered for a proper purpose . . . [and] from the assessment that the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice," and otherwise. 485 U.S. 681, 691 (1988). In Mr. Hadley's case, the proper purpose allowed by the trial court was "intent". The improper purpose would have been to use the extrinsic act evidence to establish the likelihood that Mr. Hadley acted in conformity with his past misdeeds.

Mr. Hadley never contended that the touchings in this case occurred, but involved only accidental or innocent touchings. Therefore, the government was never required to overcome a defense of mistake or accident. Yet, the government now mistakenly relies upon *State v. Edward Charles L.*, 398 S.E. 2d 123, 131-33 (W.Va. 1990). First, Edward Charles L. explicitly raised the defense of accident. Second, the Supreme Court of Appeals of West Virginia expressly created a "sexual propensity exception" to Rule 404(b). The exception is not allowed by the Federal Rules of Evidence. Moreover, the West Virginia Court only allowed evidence of prior sexual misdeeds between the victim at trial and the defendant. Evidence of prior misconduct involving third persons was not allowed.

The government complains that reasonable doubt may have pervaded the testimony of Amadee R. without the propensity evidence provided by Cory K. and Kyle Hartman. (See Br. of U.S. at p. 20). The government's fear that the jury may have believed that Amadee R. "made it up" was based upon the direct testimony of Jonathan T., who stated that Amadee R. told him that he had made up stories about Verl Hadley. (Def. Ex. "I", J.A. 159-61).

As conceded by the government, the jury would be less likely to resolve the dispute between Jonathan T. and Amadee R. if they were presented with evidence of prior misconduct by Mr. Hadley. (Br. of U.S. at p. 21). In other words, the

evidence was admitted to show that Verl Hadley acted in conformity with his past, uncharged misdeeds.

The government surprisingly relies upon the prior uncharged misconduct evidence as a "pattern of conduct [that] may reflect a person's *modus operandi* . . . ". (Br. of U.S. at p. 26). But, evidence of *modus operandi* is used to establish "identity", not propensity. Of course, the government never offered the evidence to establish "modus operandi" or "identity". In any event, there was never any question about "identity" in this case. All of the students knew Mr. Hadley. The only question was whether or not Mr. Hadley touched them as they suggested.[10]

To be sure, evidence of uncharged misconduct is excluded from jury trials for the well documented reason that juries tend to punish the defendant because he has been shown to be a "bad man". The extrinsic act evidence did not prove that Mr. Hadley committed the acts charged in the indictment. Instead, the evidence tended to indicate that Mr. Hadley was a "bad man" deserving of punishment. It tended to induce a compromise verdict in spite of the fact that reasonable doubts may have pervaded the acts charged. As the notes of The Advisory Committee on the 1972 Proposed rules provide, the rule against propensity evidence "is so deeply imbedded in

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[10] The cases relied upon by the government at p. 26 of its brief relate to "signature crimes" to establish "identity". See, e.g., *United States v. Hudson*, 84 F. 2d 1016, 1021, (7th Cir. 1989). Although the government later argues that "[n]o one disputes [the] general proposition" that an offer to concede or stipulate the issue of intent should be a relevant fact to consider under Rule 403, *Hudson* shows that the 7th Circuit has expressly taken the position that stipulations will not be considered under Rule 403 if a "specific intent" crime has been charged. See *United States v. Hudson*, 884 F. 2d 1016, 1022 (7th Cir. 1989). To be sure, this case was accepted by the United States Supreme Court to resolve the issue of whether or not a proposed stipulation should be a relevant factor to consider under Rule 403. The issue obviously remains viable even though the government would like to avoid it within the context of this case.

The issue in this case is whether or not the proposed stipulation should have been considered under Rule 403. Once considered, the remaining issue is whether or not the proposed stipulation would have fairly eliminated the issue of intent, yet simultaneously allowed the government to present its full case against Mr. Hadley without resorting to the use of prior misconduct evidence for an improper purpose.

our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence." Character evidence "tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of the respective characters despite what the evidence in the case shows actually happened." (See Br. of Pet. at p. 14a). Evidence of specific instances of conduct "possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently, the rule confines the use of evidence of this kind in cases in which character is, in the strictest sense, in issue and is deserving of a searching inquiry." Notes of Advisory Committee on 1972 Proposed Rules, Rule 405; (Br. of Pet. at p. 20a).

Finally, the government has chosen not to refute any of the modern studies which unequivocally show that juries tend to convict persons on a lesser standard of proof if prior uncharged misconduct evidence is presented to them. In other words, if enough mud is thrown against the wall, some will stick. Instead, the government asks this Court to engage in the fanciful notion that a "rational jury can be expected to reject [the implication of propensity] on its own, reasoning that character based inferences are not reliable." (Br. of U.S. at p. 37). We submit that the fanciful notions of the government about how juries behave is no substitute for empirical evidence and careful application of Rules 403 and 404(b). Also see Imwinkelried and Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 Pacific L.J. 1005, 1038-41 (1992) (empirical evidence update).

In the same vein, we can no longer presume that juries follow instructions regarding prior bad act evidence. The vast amount of empirical evidence shows otherwise. Moreover, the ineffective use of a limiting instruction should not allow the misuse of uncharged misconduct evidence in the first instance. The "practical and human limitations of the jury system cannot be ignored". *Bruton v. United States*, 391 U.S. 123, 135 (1968). The government's contention that the danger of unfair prejudice could be controlled with the use of a limiting instruction in a case involving explicit sexual acts against children is unconvincing.

G. UNFAIR SURPRISE.

The government dismisses Mr. Hadley's claim of unfair surprise by submitting that the "government announced on a Thursday that it had located Hartman and intended to call him as a witness. J.A. 48. Hartman did not testify until the following Tuesday." The government's argument is that counsel had ample time to investigate Mr. Hartman and his allegations. (Br. of U.S. at n. 24).

Of course, counsel was in trial. Trial was held on Thursday, Friday, and Tuesday. Mr. Hartman was from Colorado. Defense counsel was not able to interview him until Monday night. The allegations ranged up to 17 years old. Defense counsel suffered from the flu over the weekend. It is a cruel assertion that defense counsel had ample opportunity without a continuance to investigate Mr. Hartman's allegations and his character for veracity. (R.T., Vol. 9, pp. 1640-1650, J.A. 67-73; Vol. 7, pp. 1404-1408, J.A. 48-50).

The refusal to grant a continuance was irrefutable error. Defense could not and did not cross-examine Kyle Hartman. Yet, he was able to extensively challenge the testimony of other "bad character" witnesses put forward by the government.

The Notes of the Advisory Committee on Rule 403 state that "unfair surprise" is a ground favoring exclusion of prejudicial evidence. (See, Br. of Pet. at 9a-10a). But, the Committee suggests that prior notice and continuances should be utilized to avoid prejudicial error. No avoidance measures were utilized in this case. Only stinging error remains.

H. THE CROSS-EXAMINATION OF VERL HADLEY WAS A LAWLESS CHARACTER ASSASSINATION.

The government does little to justify its character assassination of Verl Hadley. (See Br. of Pet. at pp. 15-16 & n. 13

and Br. of U.S. at n. 10). On direct, counsel only asked Mr. Hadley about the issues raised in this case.

> MR. TREBON: I didn't ask him if he ever had sex with any minors. I asked about people involved in this case only.
>
> THE COURT: That's true.

(R.T., Vol. 7, p. 1376, J.A. 123). The cross-examination far exceeded direct examination in violation of Rules 608 and 611(b). The government asserted that Mr. Hadley "puts his character in issue when he takes the stand." (R.T., Vol. 7, p. 1343, J.A. 40). The government is wrong. The defendant, like any other witness merely puts his character for veracity on the line by taking the witness stand.

> A defendant does not "put his character in issue" by merely taking the stand. However by taking the stand, certain evidence of bad character is admissible to attack defendant's credibility as a witness.

Moore's Federal Practice, Sec. 404.12 [Character of the Aceused] (2nd Ed. 1988). The broad character assassination was improper and constituted extreme, unfair prejudice. *Abel* does not support the government's position within the circumstances of this case. *United States v. Abel*, 469 U.S. 45, 55-56 (1984). The government was also allowed to introduce extrinsic evidence not allowed by Rule 608(b).

The use of alarming prior bad act evidence rendered the trial unfair. Intelligent use of the proposed stipulation or judicial admission would have given a fair trial to both parties.

Respectfully submitted,

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